SUPREME COURT, U. S.
AUG 1 1970

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. —

ROSA M. FIGUEROA DE ARROYO, et al.,
PETITIONERS,

v.

PUERTO RICO TELEPHONE COMPANY AND SINDICATO TRABAJADORES PACKINGHOUSE, AFL-CIO, et al.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

A. J. AMADEO MURGA
512 San Alberto Condominium
605 Condado Avenue
Santurce, Puerto Rico
Counsel for Petitioners

Blanchard Press, Inc., Boston, Mass — Law Printers

INDEX

	Page
Petition	1
Opinion Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	3
Statement	4
Reasons for the Allowance of the Writ	8
Argument	9
1. The decision of the First Circuit Court of Appeals in reversing the finding of the jury that petitioner Rosa M. Figueroa de Arroyo was as useful as any less senior employee, which was backed by evidence sufficient to support said verdict, when looked at in its most favorable light and without weighing the favorable evidence against the contrary evidence submitted by the defendant runs contrary to the provisions of the Seventh Amendment of the Constitution of the United States as interpreted by this Court.	9
2. The decision of the First Circuit in reversing the judgment in favor of Elsie Iñigo Bernier against the employer solely because the Union took her grievance to a grievance committee where it has remained for seven years without further action is contrary to the rights of the individual employee as sought to be protected by Section 301	13
3. The denial of attorney's fees against the employer in a successful 301 action is contrary to the federal labor policy of protecting the rights of the individual employee and is a	

Page

factor in weakening the efforts to redeem the rights of employees injured by the conduct of both, the employer and the Union . . 14

Conclusion . . 16

Appendix A . . 17

Table of Citations

Cases

Atlantic and Gulf Estevedores Inc. v. Ellerman Lines Limited, et als, 369 U.S. 355 (1962) . . 9, 11

Grady v. Southern Railroad, 320 U.S. 476 (1943) . . 11

Boeing v. Shipman, 389 F.2d 507, 513 (1968) . . 13

Boeing v. Shipman, 411 F.2d 365 (1969) . . 10, 11

Continental Ore, et al. v. Union Carbide and Carbon Corp. et al., 370 U.S. 690 (1962) . . 9, 11

Dehydrating Process Company v. A. and O. Smith Corp., 292 F.2d 653 (1961) . . 10

Draper v. Washington, 372 U.S. 487 (1963) . . 9, 11

Fleishman Distilling Corp. v. Maier Brewing Company, 386 U.S. 714, 875 Ct. 1404 (1967) . . 15, 16

Gunning v. Cooley, 281 U.S. 90 (1930) . . 9

Lavender v. Kurn, 327 U.S. 645 (1946) . . 11

Magnat Corp. v. B and B Electroplating Company, 358 F.2d 794, (1966) . . 10

Mogge v. District Number 8 International Association of Machinists, 387 F.2d 880 (1968) . . 14

Pan Am Airways v. Ramos, 357 F.2d 341 . . 15

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 . . 15, 16

Wilkerson v. McCarthy, 336 U.S. 53 (1949) . . 9, 10, 11, 12

Page

Statute and Miscellaneous

Bagalay, Jr. Directed Verdicts and the Right to Trial by Jury in Federal Courts, 42 Texas Law Review 1053 (1964) 9, 10

2 B. Barron, Holtzoff Federal Practice and Procedure, Section 1075, Pages 401-404 10

Labor Management and Relations Act of 1947, Section 301; 29 U.S.C. 185 2, 3, 5, 8

Rules of the United States Supreme Court 19, 21, 22 and 23 2

28 U.S.C. Section 1254 (1) and 2101 (c) 2

Constitutional Amendment

U.S. Constitution:
Seventh Amendment 4, 8, 9, 11

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

ROSA M. FIGUEROA DE ARROYO, et al.,
PETITIONERS,

v.

PUERTO RICO TELEPHONE COMPANY AND SINDICATO TRABAJADORES PACKINGHOUSE, AFL-CIO, et al.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on April 17, 1970 insofar as it reversed a portion of the judgment issued by the United States District Court for the District of Puerto Rico dated March 6, 1968, in accordance with the verdict of the jury and also insofar as it denied petitioners attorney's fees.

Opinion Below

The judgment of the United States District Court for the District of Puerto Rico was made and entered on March 6, 1968. It is unreported and is printed in the Appendix to this petition, pp. 54-57. Said judgment was the subject of several post trial motions. By a memorandum opinion dated August 6, 1969, the post trial motions were overruled. The memorandum opinion is printed in the Appendix, pp. 38-53. It is reported at 302 F.Supp. 224 (D.P.R. 1969).

The judgment of the United States Court of Appeals for the First Circuit was issued and entered April 17, 1970 and is printed in Appendix at pages 17-37.

Jurisdiction

The jurisdiction of this Honorable Court is based under 28 USC Section 1254 (1).

Statute Involved

The statutory provision involved in the instant case is Section 301 of the Labor Management and Relations Act of 1947 (29 USC, Section 185) which reads as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> "(b) Any labor organization which represents employees in an industry affecting commerce as defined

in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

"(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization."

"(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156."

Questions Presented

1. Whether the Court of Appeals can redetermine the facts found by the jury which are supported by adequate

evidence without infringing the provisions of the Seventh Amendment to the effect that no fact tried by a jury shall be otherwise reexamined in any Court of the United States, except according to the rules of the common law.

2. Whether an employee found wrongfully discharged by his employer and whose grievance has been the subject of an indefinite impasse without resolution sought by either the employer or the Union is entitled to damages against the employer or to some kind of remedy.

3. Whether employees can recover attorney's fees against the employer in a 301 action.

Statement

This case originated in September 18, 1963, when the Puerto Rico Telephone Company, co-respondent herein, dismissed petitioner Elsie Lugo Bernier from its employ as a switchboard telephone operator in the Mayaguez Plant, at Mayaguez, Puerto Rico allegedly on the grounds of a reorganization of the operations of the company. On April 4, 1964 the Puerto Rico Telephone Company dismissed another six petitioners, including Rosa M. Figueroa de Arroyo on the same grounds of a reorganization. At the time of their dismissals all petitioners were covered by a collective bargaining contract between the Puerto Rico Telephone Company and the Sindicato de Trabajadores Packinghouse AFL-CIO. Miss Lugo Bernier's grievance (a violation of the seniority clause) was the subject of a grievance procedure during the latter part of 1963 with no resolution either way. The grievance committee's meetings ended in an impasse (Opinion of Circuit Court, p. 20, herein) No further action was taken by either party, that is the Union and the employer to adjudicate her rights. In the case of the dismissals of April 4, 1964, no grievances were filed. Petitioners, after exhausting all remedies, brought the

present suit in the U.S. District Court for the District of Puerto Rico against both, the Union and the employer, under the provisions of Section 301 of the Labor Management Act of 1947, seeking damages, reinstatement and or an order against the defendants to proceed to arbitrate their grievances.

The case went to trial before a jury early in 1968 and it was found by a first jury, on a special verdict, that all petitioners had been dismissed wrongfully by the employer in violation of the seniority clause in effect at the time of the dismissals. The jury made the special finding of fact, that all petitioners, were as useful as any other retained employee with less seniority. The case then proceeded before another jury for a determination whether the Union had breached its duty of fair representation. The second jury found it had except in the case of Elsie Lugo Bernier and rendered a verdict for past wages in favor of all petitioners and against the defendants, apportioning the liability sixty per cent to the employer and forty per cent to the Union except in the case of Elsie Lugo where liability was imposed solely to the employer. The court entered judgment on the verdicts denying petitioners prospective remedy and attorney's fees. The First Circuit Court of Appeals, affirmed the judgment in all cases except Elsie Lugo Bernier's and Rosa M. Figueroa de Arroyo. It granted prospective relief to the prevailing petitioners, but denied attorney's fees.

Elsie Lugo Bernier's judgment was reversed because the Circuit considered that it could not stand in the absence of a finding of breach of duty of fair representation on the part of the Union. In the case of Rosa M. Figueroa de Arroyo, it reversed, finding that there had been insufficiency of evidence. The facts in the case of Rosa M. Figueroa de Arroyo are as follows:

Rosa M. Figueroa de Arroyo started working with the Puerto Rico Telephone Company on October 3, 1958. In

May 1960 she went to work as a switchboard operator at the company's offices in Mayaguez. When she was fired on April 4, 1964, her supervisor, Ramonita Padovani, gave her a pat on the shoulder and gave her advice of not to have any more children. (Joint Appendix filed with Court of Appeals, p. 57). The Manager of the Puerto Rico Telephone Company in Mayaguez admitted to her that an injustice had been made, but that he himself was not going to get to the age of Social Security with the Puerto Rico Telephone Company. (Page 58, Joint Appendix). Rosa M. Figueroa de Arroyo was efficient and responsible in her work, always on time and maintained a record of the tickets. She was always clean and tidy on the job and remained at her place of work and never looking to the side. She had been doing a good job and the attitude of her supervisor was good and communicated to her that she was doing a good job, and she tried to maintain the quality of her work up. (Page 60, Joint Appendix). On the basis of observations made by the assistant chief operator from August 1962 to September 19, 1963, she was considered to be more useful than other employees retained with less seniority. (Page 101, Joint Appendix).

Nevertheless, her performance was the subject of various criticisms. The criticisms were substantial in 1964. They were as follows:[1]

> "1-30-64
>
> "January 30, 1964. Rosa M. Figueroa, Operator 38. I finished taking an observation at five minutes from 3:45 p.m. Took to her a card for her to correct since it had an erroneous detail. She, being quite mad, corrected it and afterwards said, the supervisor's always after you and fiscalizing you, but never helping anyone. Mrs. E. Acevedo?

[1] We have quoted verbatim from Puerto Rico Telephone Company's brief to the First Circuit Court of Appeals, pages 49-50.

(4 Tr. 500, Vol. X, p. 192 of Record)."

3-12-64

"Miss Carrion called from San Juan concerning that Operator 38 had called her in a cross manner asking her about somebody that had called her, says she could not answer this operator because she could not listen to the subscriber that was talking to her. She tried to ask from what number they were talking from but there was so much noise and voices were heard so she could not distinguish the number given by the subscriber. The operator insisted so much that regardless she wanted to know the number she was calling, that is the person who had made the call. She wanted that the call be charged to San Juan to Miss Carrion because what she needed was to collect the call no matter how."

"Miss Carrion said it does not matter if she has to pay or if it is paid by the company, but that the operator should have some more care and her should improve. Investigation, I investigated with the operator. She says she had a call Aguadilla from telephone 891-9487. She could not collect it because she hung up. Says she tried to investigate who it was in order to collect the call. That is why she called Miss Carrion, to see if she knew who had called her, because the person hung up before collecting. Action, I talked with the operator and told her about the complaint and the tone that she had used toward Miss Carrion. I advised her that in the future in which such a case would arise, the same toward a chief as toward a subscriber. The operator gave her excuses about the incident. I called again Miss Carrion and told her that the operator was very sorry about the incident and excused herself. Miss Carrion says that she only wishes that this operator tries to improve her tone and way of dealing with subscribers."

"I talked with her and promised that it would not happen again. Graciela Hernandez, 3-12-64)." (1 Tr. Page 502-403)

4-2-64

"Rosa M. Figueroa 4-2-64. Today I called her to inform her about the irregularities of mark sense for the month of March and her attitude was negative. Graciela Hernandez." (1 Tr. 504, Vol. X, p. 192 of Record)

These shortcomings could be explained in terms that in a particular day the employee might be in a bad state of character. (Page 535, Transcript First Trial.) It was uncontroverted that the conditions before the introduction of the DDD were extremely overloaded and that the telephone operators had a lot of work and there were a number of vacancies. (Page 537, Transcript First Trial.) Finally, it is an admitted fact that the return of Rosa M. Figueroa de Arroyo was desirable. (Opinion of the Court of Appeals, page 27 herein).

Reasons for the Allowance of the Writ

1. The decision of the First Circuit Court of Appeals in reversing the finding of the jury that petitioner Rosa M. Figueroa de Arroyo was as useful as any less senior employee, which was backed by evidence sufficient to support said verdict, when looked at in its most favorable light and without weighing the favorable evidence against the contrary evidence submitted by the defendant runs contrary to the provisions of the Seventh Amendment of the Constitution of the United States as interpreted by this Court.

2. The decision of the First Circuit in reversing the judgment in favor of Elsie Lugo Bernier against the employer solely because the Union took her grievance to a grievance committee where it has remained for seven years without further action is contrary to the rights of the individual employee as sought to be protected by Section 301.

3. The denial of attorney's fees against the employer in a successful 301 action is contrary to the Federal labor policy of protecting the rights of the individual employee and is a factor in weakening the efforts to redeem the rights of employees injured by the conduct of both the employer and the Union.

Argument

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IN REVERSING THE FINDING OF THE JURY THAT PETITIONER ROSA M. FIGUEROA WAS AS USEFUL AS ANY LESS SENIOR EMPLOYEE, WHICH WAS BACKED BY EVIDENCE SUFFICIENT TO SUPPORT SAID VERDICT, WHEN LOOKED IN ITS MOST FAVORABLE LIGHT AND WITHOUT WEIGHING THE FAVORABLE EVIDENCE AGAINST THE CONTRARY EVIDENCE, SUBMITTED BY THE DEFENDANT RUNS CONTRARY TO THE PROVISIONS OF THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS INTERPRETED BY THIS COURT.

The present petition involves a determination as what is the proper test of sufficiency of evidence for the submission of a case to a jury in the federal courts. This Supreme Court on many occasions interpreting the scope of the Seventh Amendment has articulated its test. *Gunning* v. *Cooley*, 281 U.S. 90 (1930); *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949); *Atlantic and Gulf Esteredores Inc.* v. *Ellerman Lines Limited* et al. 369 U.S. (1962); *Continental Ore et al* v. *Union Carbide and Carbon Corp. et al* 370 U.S. 690 (1962); *Draper* v. *Washington*, 372 U.S. 487 (1963). See also *Bagalay, Jr., Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 *Texas Law Review* 1053 (1964).

The First Circuit Court of Appeals in reversing the finding of the jury that petitioner Rosa M. Figueroa de Arroyo was as useful as any of the less senior employees failed to apply the test established by this Supreme Court. It rather applied its own test of sufficiency of evidence stated in

Magnat Corp. v. *B and B Electroplating Company*, 358, F 2d-794, (1966) in which it cited *Dehydrating Process Co.*, v. *A. O. Smith Corp.* 292 F 2d, 653 (1961). The First Circuit does not consider itself to be bound by the test established by this Supreme Court in *Wilkerson* v. *McCarthy*, *supra*, on the grounds that the Wilkerson test of sufficiency of evidence is limited only to cases brought under the Federal Employers Liability Act and the Jones Act cases. See *Dehydrating Process Company* v. *A. O. Smith Corp.*, *supra*. This assumption that there is a duality of test, one for Fela cases and Jones cases and another for diversity jurisdiction and other type of case, is shared by the Fifth Circuit Court of Appeals. See *Boeing* v. *Shipman*, 411 F 2d 507 (1968). The correctness of that assumption has been challenged by Judge Rives in the dissenting opinion in *Boeing* v. *Shipman*, *supra*, and *Bagalay, Jr., Directed Verdicts and the Right to Jury Trial in Federal Courts*, *supra*.

The controversy has plagued the Circuits in the absence of a clear statement by this Supreme Court. The need for such action by this Supreme Court have been expressed by judges and commentators. See Judge Rives dissenting opinion in *Boeing* v. *Shipman*, *page 382*; and *2 B. Barron and Holtzoff Federal Practice and Procedure*, Section 1075, Page 401-404 (By Professor Wright).

The difference between the test adopted by the First Circuit in *Magnat* and the Fifth Circuit in *Boeing* as governing all non Fela and non Jones acts cases in the Federal Court and the test of sufficiency of evidence set out by this Supreme Court for all cases and not merely Fela cases was analyzed in the dissenting opinion in the Boeing case. It is not the scintilla of evidence test, which the First Circuit assumes to be the alternative to its own test. See opinion of the Court, page 27 herein and *Boeing* v. *Shipman*, *supra*, dissenting opinion, page 383. The proper test, in line with this Supreme Court, is whether looking at all the evidence, there is evidence and reasonable inferences from said evi-

dence which supports the case against whom a peremptory instruction has been given. *Boeing Company* v. *Shipman*, *supra*, page 382. The Fela test, which we submit is the only proper test, does not permit any weighing of the evidence by the appellate court. In other words, if giving complete credibility to the evidence of the party against whom the motion is brought and giving said party the benefit of all reasonable inferences which arise from the evidence, there is enough evidence to support the verdict of the jury, then said verdict must stand. *Brady* v. *Southern Railroad*, 320 U.S. 576 (1943). The test of the majority upon which the First Circuit Court based its reversal in the present case, allows the court to consider all the evidence in the light most favorable to the non-mover's case, but interjects the notion that if the facts and inferences points strongly and overwhelmingly in favor of the mover, then the granting of the motion is proper. This we submit permits the weighing of the evidence by the reviewing court to determine whether it is strong and overwhelming in favor of one party. It really substitutes the criteria of the judge for that of the jury.

The "reasonable man" test permits a redetermination by the reviewing court of the facts by the jury, which we submit is contrary to the teaching of this court in interpreting the Seventh Amendment. *Wilkerson* v. *McCarthy*, *supra*; *Continental Oil* v. *Union Carbide and Carbon Corp.* 370 U.S. 690, 1962; *Lavender* v. *Kurn* 327 U.S. 645, 1946; *Atlantic and Gulf Esteredores* v. *Ellerman Lines*, *supra*; *Draper* v. *Washington*, 372 U.S. 487, (1963).

The difference in the test is admittedly one of degree and one which has to be tested always within the context of specific facts. Yet, the test approved by this Court in the Fela cases reflect the value of greater deference to the jury institution in its role as a final arbiter of facts in the American judicial system. See *Boeing* v. *Shipman*, dissenting opinion. The reasonable man test adopted by the

First Circuit downgrades the scope of the Seventh Amendment and the role of the jury as a final arbiter of facts. A value which this Honorable Court does not have to be reminded of.

Under the test set out by this court in *Wilkerson*, looking to all the evidence, there was sufficient evidence to sustain the finding of the jury in spite of the existence of contrary evidence. Under Wilkerson test, it was not for the Court of Appeals to reweigh the evidence and determine which result would have been more reasonable. For there was evidence submitted by the plaintiff to the effect that Rosa M. Figueroa de Arroyo was as useful as other less senior employees retained by the company when the plaintiff Rosa M. Figueroa de Arroyo was dismissed. This evidence consisted in her own testimony, the testimony of Iris Torres de Hernandez and an admission by the Puerto Rico Telephone Company that her return was desirable. The contrary evidence merely showed that during some period there had been heavy criticism of her work. It is to be noted that the last entry of criticism was made on April 2, 1964, when the decision to dismiss Rosa M. Figueroa de Arroyo had already been made. It is also an established fact that her supervisor told her when she was dismissed not to have any more children. Without weighing all the evidence offered by the parties and giving Rosa M. Figueroa de Arroyo the benefit of all inferences, there can be no question that there was sufficient evidence to support the finding of the jury under the test set out by this Supreme Court in *Wilkerson v. McCarthy, supra.*

Even under the reasonable man test it cannot be said that the facts and inferences pointed out so strongly and overwhelmingly against Rosa M. Figueroa de Arroyo that a directed verdict was proper. For there was sufficient evidence to the contrary and faced with said conflicting evidence the jury was free to disregard it. Considering the

evidence in the strongest light in favor of the party against whom the motion is brought and giving said party the advantage of every fair and reasonable intendiments that the evidence can justify, it must be concluded that there was sufficient evidence to support the finding of the jury.

Certainly, the jury could have reasonably concluded that during the last three months in her employ, Rosa M. Figueroa de Arroyo had been acting under stress because of excessive work load and insufficiency of personnel. This was the situation prevailing before the introduction of the Direct Dialing System. Certainly, the existing favorable comments during 1963 were sufficient to diminish the force of unfavorable comments for a period of time of lesser extension.

In the case of the other petitioners, in which the reviewing court upheld the finding of the jury, the evidence, which was submitted, was identical or very similar to the one submitted in Rosa M. Figueroa de Arroyo's case. The sole source of contrary evidence are the comments herein before expressed. Viewing the evidence in its most favorable light to the plaintiff Rosa M. Figueroa de Arroyo one is not persuaded that it was not sufficient to go to the jury. It was for the jury also to conclude that in the occasions in which Rosa M. Figueroa de Arroyo did not perform adequately she was suffering from heavy stress due to an excessive work load and insufficiency of personnel. If the Court of Appeals felt that the verdict of the jury was contrary to the weight of the evidence and it was unfair and unjust, the correct remedy was to order a new trial. *Bocina Company* v. *Shipmaine*, 389 F 2d 507, 513 (1968).

2. The Decision of the First Circuit in Reversing the Judgment in Favor of Elsie Lugo Bernier Against the Employer Solely Because the Union Took Her Grievance to a Grievance Committee Where It Has Remained For Seven Years Without Further Action Is Con-

trary to the Rights of the Individual Employee as Sought To Be Protected by Section 301.

The decision of the First Circuit Court deprives Elsie Lugo Bernier of any remedy at all in spite of the fact that she was found dismissed illegally by the employer. The fact that their grievance has been in an impasse, since 1963 until the present should be enough to sustain the decision of the Trial Court in allocating the responsibility in the company. This is not the case where the Union processes the grievance and looses. This is the case where the grievance was submitted to grievance procedure in 1963 and is still pending. The fact that the Union has not acted for such a long period of time is equivalent to a breach of its duty of fair representation as a matter of law and the employee should be deemed to have exhausted his contractual remedies. Any other result permits the union to stall indefinitely the grievance of any employee.

At any rate, the Circuit Court should have afforded the petitioner Elsie Lugo Bernier some remedy like arbitration directing the employer and the union to arbitrate the grievance to its conclusion. Arbitration has been used as the proper remedy in Section 301 cases. *Mogga, v. District Number 8, International Association of Machinist* 387, F 2d 880, (1968).

3. The Denial of Attorney's Fees Against the Employer in a Successful 301 Action Is Contrary to the Federal Labor Policy of Protecting the Rights of the Individual Employee and Is a Factor in Weakening the Efforts To Redress the Rights of Employees Injured by the conduct of both the Employer and the Union.

At the outset it must be stated that we are asking this Court in the name of overriding "consideration of justice" to make an exception to the rule long established that attorney's fees are not ordinarily recoverable in the absence of statute or contract providing their recovery.

Fleischman Distilling Corp. v. *Maier Brewing Company*, 386 U.S. 714, 87 S. Ct. 1404 (1967). The considerations of justice were aptly expressed by the First Circuit Court of Appeals in a footnote. (Opinion of the Circuit Court, p. 39 herein).

"Moreover, the alleged wrong inflicted on the employee, loss of employment in violation of contractual rights; the anticipated recovery, perhaps too insubstantial to sustain competent counsel's best efforts to obtain redress; and the ultimate purpose being any recovery in such a case, making the employee whole, all suggest that the employee may need some financial assistance to press his claim and, if successful, should retain a substantial portion of the jury's "Lost Earnings" award for himself. Finally, the cost of attorney's fees is an injury to the employee directly attributable to and necessitated by the failure of the union and or the employer to utilize the contractual grievance procedures designed to remedy breach of contract claims without resort to the courts".

Aside from those considerations, there was another basis for awarding attorney's fees. Attorney's fees are recoverable under Puerto Rican Law. *Pan Am Airways* v. *Ramos*, 357 F. 2d 341. Although ours is not a diversity case, no doubt, the Federal Court could incorporate local law not inconsistent with the aims and purposes of Federal Law. *Textile Workers Union* v. *Lincoln Mills* 353 U.S. 448.

In *Lincoln Mills*, this Supreme Court stated that the state law if compatible with the purpose of Section 301, may be resorted to in order to effectuate the federal labor policy.

There is no doubt that the federal policy would be effectuated by permitting the employee to recover attorney's fees. In this area, where it is so difficult for the employee to vindicate his infringed rights, the granting of attorney's fees constitute an essential ingredient of the remedy.

This Supreme Court should not be constrained by its holding in *Fleischman Distilling Corp. v. Maier Brewing Company, supra*, in which it dealt with a statutory scheme creating the remedy, which had omitted the granting of attorney's fees. Rather, we are dealing with Section 301 action in which the doctrine of *Lincoln Mills* controls. This Court is free to apply equitable principles to carry out the purposes of federal labor policy.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

A. J. AMADEO MURGA
512 San Alberto Condominium
605 Condado Avenue
Santurce, Puerto Rico 00907
Telephone: 725-8181

Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

United States Court of Appeals
For the First Circuit

Nos. 7456, 7457, 7458.

ROSA M. FIGUEROA de ARROYO, et al.,
PLAINTIFFS, APPELLANTS IN No. 7457;

v.

SINDICATO de TRABAJADORES PACKINGHOUSE, AFL-CIO, et al.,
DEFENDANTS, APPELLANTS IN No. 7456,

and

PUERTO RICO TELEPHONE COMPANY,
DEFENDANT, APPELLANT IN No. 7458.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

A. J. Amadeo Murga for Rosa M. Figueroa de Arroyo et al.

Irving M. King, with whom *Eugene Cotton*, *Richard F. Watt*, *Luis G. Estades* and *Cotton, Watt, Jones, King & Bowlus* were on brief, for Sindicato de Trabajadores Packinghouse, AFL-CIO, Distrito de Puerto Rico, et al.

Richard L. Marcus, with whom *Matthew E. Murray*, *Fernando Ruiz-Suria*, *Antonio Bird, Jr.*, *Seyfarth, Shaw, Fairweather & Geraldson* and *McConnell, Valdes, Kelley & Sifre* were on brief, for Puerto Rico Telephone Company.

April 17, 1970.

COFFIN, *Circuit Judge*. Plaintiffs are seven telephone operators formerly employed by defendant Puerto Rico Telephone Company [hereinafter "Company"] at Mayaguez and members of defendant Sindicato de Trabajadores

Packinghouse, AFL-CIO, and its local affiliate, Local 963 [hereinafter collectively "Union"]. They were discharged by the Company—one in September 1963 and the other six in April 1964—allegedly in contravention of the seniority provisions of the collective bargaining agreement between the Company and the Union. They immediately communicated the fact of their discharge to the Union but after the Union failed to take their claims through the grievance procedure, the plaintiffs filed suit, on November 22, 1965, against both the Union and the Company.[1]

A first jury returned special verdicts that the Company's dismissal of plaintiffs had violated the seniority provisions, and that plaintiffs had properly submitted their claims to the Union. A second jury found that the Union had breached its duty of fair representation—with regard to six of the seven plaintiffs—and awarded plaintiffs varying amounts for lost earnings, allocated in varying portions between the Company and the Union. . . .

The Union appeals from the finding of a breach of its duty of fair representation and the assessment of damages; the Company appeals from the finding of improper discharge, the finding that the Union had breached its duty, and the assessment of damages; and the plaintiffs appeal on the ground that additional elements of damages—including reinstatement—should have been awarded. We consider the appeals in that order.

The Union's Duty of Fair Representation

"Fair representation", conceived in a racial discrimination context in *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), has matured into a broader obligation for unions, most recently articulated in *Vaca* v. *Sipes*, 386 U.S. 171 (1967). *Republic Steel* v. *Maddox*, 379 U.S. 650, 652-653

[1] Subject matter jurisdiction against the Company is founded on § 302a of the Taft-Hartley Act, 29 U.S.C. § 185(a) (1964), and against the Union on 28 U.S.C. §§ 1331, 1337 (1964). *See Brady* v. *Trans World Airlines, Inc.*, 401 F.2d 87, 94 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).

(1965), had established that an employee under a collective bargaining agreement which provides exclusive remedies for breaches of that agreement must attempt to exhaust those contractual remedies before resorting to the courts. *Vaca* then made clear that the employee could overcome the employer's defense of failure to exhaust contractual remedies by proving that the employer had repudiated those remedies, or that the Union had—by a breach of its duty of fair representation—prevented the employee from exhausting those remedies, or that there was some other valid reason why the contractual remedies could be disregarded. *Vaca* v. *Sipes*, *supra* at 184-186; *see Glover* v. *St. Louis - S. F. R. Co.*, 393 U.S. 324, 329-331 (1969). Plaintiffs here sought to overcome this "exhaustion of contract" barrier by attempting to prove that the Union's "unfair representation" prevented the requisite exhaustion.

Vaca held that an employee does not have an absolute right to have his grievance taken through the grievance procedure;[2] unless the contract otherwise provides, the union has a range of discretion within which to determine that an employee's grievance is without merit. *Vaca* v. *Sipes*, *supra* at 191-193. Instead, the employee must prove arbitrary or bad faith conduct—variously referred to as the absence of honest purpose and judgment and/or the presence of hostility or discrimination—on the part of the union in order to prove that it has breached its duty. *Vaca* v. *Sipes*, *supra* at 190, 193; *Humphrey* v. *Moore*, 375 U.S. 335, 349-350 (1964); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-338 (1953). However, while due care has not been made

---

[2] While *Vaca* dealt with a union's refusal to take a processed grievance to arbitration, we see no reason to differentiate between the step of arbitration and earlier steps in the grievance procedure. The same principle applies: when the contract gives the union exclusive control over a grievance, the union must have that control in order for the whole process to function smoothly and effectively, which logic surely applies to all stages of the grievance procedure. *See* Comment, 17 Buffalo L. Rev., 165, 176-177 (1967).

a part of the union's duty, the Court has "accept[ed] the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion." *Vaca* v. *Sipes*, *supra* at 191, 194; *see also Republic Steel* v. *Maddox*, *supra* at 652.

Applying this multifaceted standard of fair representation to our case, we can rule out any possibility of subjective bad faith, hostility, discrimination, or dishonesty on the part of the Union officials in failing to press plaintiffs' grievances. Mr. Sanchez—the Union official who was responsible for the Union's action in this case—appears from the record as a dedicated Union leader and legislator of manifold responsibilities. However, we are still left with the Court's recognition that arbitrary and perfunctory handling by a union of an apparently meritorious grievance is not acceptable under the standard of fair representation.

This case reveals such handling. There was no evidence as to any plaintiff except Elsie Lugo[3] that the Union ever investigated or made any judgment concerning the merits of her grievance. *See Local Union 12, United Rubber Workers* v. *N.L.R.B.*, 368 F.2d 12, 17-18 (5th Cir. 1966). Its entire attention during 1964 centered on an NLRB proceeding aimed at preventing the Company from contracting out work involving the installation of new equipment. Just before the six plaintiffs were dismissed in April 1964, the trial examiner made his report which explicitly confined its relief to those dismissed because of subcontracting, to which the Union filed no exceptions. In the face of that report and clear evidence that plaintiffs were dismissed because of automation rather than subcontracting, the Union presi-

[3] The second jury's finding that the Union fulfilled its duty of fair representation with regard to Miss Lugo is supported by evidence that the Union pressed her grievance to impasse immediately after her dismissal in September 1963. This failure to prove that the Union's unfair representation prevented her from exhausting contractual remedies bars her recovery against the Company in this case. *See* discussion in text *supra*.

dent inexplicably concluded that the NLRB proceeding would adequately protect plaintiffs' rights. Clearly, the jury was warranted in finding that the Union's failure to press plaintiffs' grievances was the result of its arbitrary and perfunctory handling of them.[4]

The Union's suggestion that its pressing of these grievances during the pendency of the NLRB proceeding would somehow have jeopardized that avenue of relief is completely without merit. There is nothing inconsistent in trying to protect the jobs of a larger number of employees vis-a-vis the less senior employees in one forum, while trying to protect the jobs of a larger number of employees vis-a-vis outside employees in another forum. Moreover, it is obvious that the Union does not breach its duty when it presses legitimate seniority claims, even though the effect of success is to jeopardize the jobs of those defined by the contract as less senior.

Finally, the Union—joined by the Company—insists that the six plaintiffs discharged in April 1964 failed to specify the seniority basis for their grievances when they complained to the Union. It is true that these plaintiffs did not testify that they told either Miss Acevedo, the local Union delegate, or Mr. Sanchez that less senior employees had been retained when they had been discharged. However, Miss Acevedo, who undoubtedly knew all 30 telephone operators in the Mayaguez unit, forwarded to Mr. Sanchez not only plaintiffs' names but their dates of hiring, which indicated that five had worked over three years and two had worked over ten years. Almost identical communication had been sufficient to initiate the seniority grievance for Miss Lugo, the least senior of the seven plaintiffs who was discharged in September 1963 and whose grievance was

[4] The defendant's argument that the charge erred in focusing solely on the Union's action in failing to process the grievances might have been well taken had there been any rational basis for relying solely on the NLRB proceeding.

pressed by the Union. Moreover, the Union had been informed just before these dismissals that they would occur because of the new automatic dialing system, so that seniority was the only possible basis for a grievance. Had the Union given anything but the most perfunctory attention to these grievances, it would have been obvious that they raised a seniority claim. We are satisfied, therefore, that the jury could have found that these seniority grievances were submitted to the Union in compliance with the appropriate provision in the collective bargaining agreement.[5]

Accordingly, we conclude that the jury was entitled to find that the Union's failure to press the six plaintiffs' grievances was the result of its arbitrary and perfunctory handling of them, and thus a breach of its duty of fair representation preventing an exhaustion of contractual remedies and enabling these six plaintiffs (*see* n. 3) to maintain their suit against the Company.

The Statute of Limitations

The Union contends, however, that even if it breached its duty of fair representation, plaintiffs' suit against it is barred by the one-year Puerto Rico statute of limitations for tort claims, 31 L.P.R.A. § 5298, since the Union's breach occurred over 19 months before plaintiffs filed suit on November 22, 1965. However, while *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, 701-705 (1966), established that § 301 suits should be governed by the state statute of limitations rather than some implied federal limitation period, the question left undecided for purposes of our case is which Puerto Rico statute of limitations applies to an employee's

[5] The Company's argument that the plaintiff's failure to speak with a Company representative within 48 hours of dismissal bars this suit would require a strained interpretation of the collective bargaining agreement resulting in a substantial pyramiding of efforts whose only apparent advantage in a dismissal case would be the insulation of the Company from litigation because of technical oversights by the employee.

suit against his union for breach of its duty of fair representation, when such suit is a part of the employee's suit against his employer for breach of the collective bargaining agreement.

At the outset it seems clear that the union's duty of fair reperesentation to those it represents cannot be considered a "contractual" duty because of the contractual relation between the union and the employer. This approach was persuasively rejected in *Nedd* v. *United Mine Workers*, 400 F.2d 103, 105-106 (3d Cir. 1968), which view is surely correct, for, as in our case, the Union's breach was not its mere failure to submit plaintiffs' grievances in compliance with the contract but rather its arbitrary, perfunctory failure to do so.

Another argument for treating plaintiffs' suit as a contractual claim is that it is their obligations of membership in the Union which generate the reciprocal obligation by the Union to perform its statutory duty of fair representation. This duty, however, imposed and defined by federal labor policy, is not capable of being bargained away by workers even though a written contract or union by-laws might so provide. Moreover, the Union, once certified, is the bargaining agent for all employees in the bargaining unit, including the non-union employees. It would be bizarre indeed of the non-union employees were considered to have a tort claim for unfair representation, with generally a shorter limitations period, while union members' claims sounded in contract and were thus subject to a longer limitation period.

It might also be argued that the employee's claim against his union should be characterized as a "contract" action whenever the employee's suit also states a claim against his employer for breach of contract, because the principal relief sought is normally reinstatement and back wages from the employer and the union may only be a party in

order for the employee to overcome the employer's "exhaustion of contract" defense. However, this view which considers the two claims as essentially inseparable is also unsatisfactory.

First, it would mean that in a given state, the employee's suit against his union for "unfair representation" would be subject to a different statute of limitations depending on whether the employee had joined his employer in the same lawsuit. More importantly, the "inseparability" rationale does not bear inspection. Obviously quite different evidence and legal argument will be addressed to the two claims. Moreover, the employee may well have a substantial claim for damages against the union which far exceeds the potential recovery against the employer, thereby destroying the premise that the claim against the union is only incidental to the more important breach of contract claim against the employer.

Finally, we detect nothing in the federal labor policy which necessitates this rather strained view of the employee's claim against his union and his employer. While the viability of the grievance procedures erected by the collective bargaining agreement may require the employee to show, as a prerequisite to his suit against his employer, that he was prevented from exhausting those contractual remedies by the union's "unfair representation", *Republic Steel v. Maddox*, *supra* at 652-653; *Vaca* v. *Sipes*, *supra* at 184-185, nothing therein requires that the union actually be *liable* for such breach.[6] Indeed, an employee could sue

[6] The Company insists that unless the Union is governed by the same statute of limitations as it is, a union may deliberately refuse to press grievances in order to provide the employee who is willing to wait out the Union's shorter statute of limitations with an opportunity to take his claim to a jury in a § 301 suit—with the Union's "unfair representation" conceded but immunized—rather than to an arbitrator at the end of the grievance procedure, which possibility allegedly circumvents our federal labor preference for arbitration. We cannot deny such possibility exists, although such union

his employer under § 301 and overcome the "exhaustion" defense by showing wrongful prevention by the union without ever formally joining the union in that suit. *Vaca* v. *Sipes*, *supra* at 186; *Serra* v. *Pepsi-Cola General Bottlers, Inc.*, 248 F. Supp. 684-688 (N.D. Ill. 1965); *Rivera* v. *NMU Pension & Welfare & Vacation Plan*, 288 F. Supp. 874, 876 (E.D. La. 1968); *cf. Czosek* v. *O'Mara*, —— U.S. ——, —— (1970).

We are therefore satisfied that any effort to characterize plaintiff's suit against the Union as a "contract" action is both unsound and unnecessary in order to effectuate existing federal labor policy. Moreover, the Union's duty seems more akin to, though less rigorous than, the duty of due care normally associated with tort actions. Finally, we detect in *Hoosier Corp.* a distinct preference for the shorter statute of limitations where the question of characterization is a close one and no manifest injustice results from such choice, which preference suggests the tort limitations period in most jurisdictions.

One other possibility must be explored. Since the employee's suit against the union is *not* founded on the labor contract, the suit may not be a § 301 suit and thus *Hoosier Corp.* may not be applicable. Even assuming the plaintiffs' claim against the Union is not a § 301 suit, we think the logic of *Hoosier Corp.* dictates the adoption of express state statutes of limitation in the absence of an express federal limitation period. The question becomes whether there is any express federal limitation period governing an action

---

conduct might constitute either an unfair labor practice, *see* n. 7 or a breach of the labor contract actionable by a § 301 suit by the employer. Moreover, it is difficult to see the real quid pro quo for the employee in such circumstances, for the damages flowing from any contractual breach become more attributable to the union's conduct than to the employer's initial breach. In short, we discount the likelihood while acknowledging the possibility, leaving it to Congress to enact some statute of limitations applicable to both employer and union. *See* text, *infra*.

against a union for breach of its duty of fair representation. Since the Union's breach may be an unfair labor practice,[7] the statutory six month limitation period for such practices, 29 U.S.C. § 160(b), could be deemed applicable to an employee's suit against the union. However, since *Vaca v. Sipes* established that federal labor policy does not require that individual suits be preempted simply because the NLRB might also be able to prosecute unions for such conduct, we see no reason why such private litigation *must* be limited by the same period as the NLRB is. By giving individual employees a period longer than the NLRB's six months, we encourage initial recourse to the Board without precluding a subsequent civil suit if the Board refuses to pursue the matter for the individual employee. Moreover, the individual suit is still analogous to an ordinary tort action regardless of the Board's concurrent jurisdiction.

We therefore conclude that plaintiffs' action against the Union in our case is properly characterized as a tort action and is therefore barred by the one year limitation period for tort claims arising in Puerto Rico. However, as we made clear above, we do not believe that the Union's immunity from suit for the breach of its duty of fair representation has any bearing whatever on plaintiffs' suit against the Company for improper discharge, the "exhaustion" defense having been overcome as to six of these plaintiffs by proof of the Union's breach.

While we are satisfied that the proper legal analysis of the union's and employer's duties in cases such as this requires the imposition of different state statutes of limitations, we are equally convinced that Congress would be

[7] *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*; *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963) (*not* an unfair labor practice); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967) (unfair labor practice); *Truck Drivers and Helpers, Local Union 568 v. NLRB*, 379 F.2d 187 (D. C. Cir. 1967) (unfair labor practice).

well advised to enact a federal statute of limitations to deal with both kinds of claims asserted here.

The Propriety of the Discharges

The issue of the adequacy of the evidence to support the special verdicts that the Company discharged plaintiffs in violation of the seniority clause is a close one. Plaintiffs' counsel failed to resort to pre-trial discovery while Company counsel appears to us to have taken refuge in an ambiguous court order to refuse to make available records of four of the plaintiffs. Plaintiffs' counsel briefed this issue superficially; Company counsel briefed it exhaustively, but, understandably, not with complete objectivity.

Our standard of review are the seniority clause itself[8] and the adequacy of the evidence to support the jury's findings that plaintiffs had carried their burden to show by a preponderance of the evidence that they were as useful as a less senior employee.[9] We require more than a scintilla. *See Magnat Corp. v. B&B Electroplating Co.*, 358 F.2d 794, 797 (1st Cir. 1966).

The case for the six plaintiffs who overcame the defense of failure to exhaust contractual remedies consisted of three components. The first was the testimony of each that she deemed herself useful and had no problems with her supervisors, and that a number of retained operators were junior to her. The second was the admission by Mrs. Ramonita Padovani, the Chief Operator for the Company who had made the selection of operators to be discharged, that each plaintiff was a good employee whose return was desirable. The third — and sole source of comparisons between plain

[8] "Seniority shall prevail if the qualifications of all the employees to be considered are equal, but shall not be used against any employee that because of his ability, competence, efficiency and better service record proves to be more useful than some other that has merely been employed for a longer period of time."

[9] Plaintiffs continue to argue in brief that defendants had the burden to show that the operators retained were more efficient than plaintiffs. But the charge of the court to the contrary was not excepted to.

tiffs and those who were retained — was the testimony of Mrs. Iris Torres de Hernandez, the former assistant to the chief Mayagnez operator for the Company, who had been laid off seven months prior to the discharges. She offered her individual assessment of each plaintiff and of some eleven other operators, all of whom were less senior than four of the plaintiffs and at least four of whom appeared from the evidence to be less senior than the remaining two plaintiffs.[10] Such testimony tended to prove that all six plaintiffs were as useful as four or more of the less senior employees. In addition, Mrs. Hernandez testified that, in her opinion, these plaintiffs were more useful than the less senior retained operators.

The Company contends that this testimony falls short of a prima facie case for plaintiffs because, in its view, Mrs. Hernandez was completely discredited as a witness. Two reasons of a general nature were asserted: that she had left the Company's service seven months before plaintiffs were dismissed, and that she had originally been a plaintiff in the case. Both factors were obviously relevant for jury assessment of her credibility but do not amount to reason for disqualification. So, too, was her heavy — but not unqualified — emphasis on seniority in assessing usefulness.

The Company more specifically relies on its impeachment of Mrs. Hernandez' testimony regarding three of the plaintiffs — Luz Arminda Toro, Andrea Colon Tubens, and Rosa Figueroa. The discrediting of her testimony as to the first two was minor. Her favorable general appraisal of Luz Arminda, an operator for fourteen years, was not necessarily discredited by evidence of two prior critical reports of the latter's performance at a period when operators were

[10] The jury could have found that Sonia de la Cruz, Elsie Camacho, Perfecta Vazquez and Ruth Soto were all less senior than plaintiff Iris Trabal Quintana, the least senior of these six plaintiffs. The Company, which had the exact length of service of all employees, failed to controvert this testimony of plaintiffs.

under some pressure in converting to a new system. Her favorable assessment of Andrea Colon was not contradicted simply because the latter has missed 200 days of work arising from an illness from which she had since recovered.

The cross-examination of Mrs. Hernandez focused primarily on her evaluation of Rosa Figueroa. Mrs. Hernandez had testified that she had never had any complaints about her. On cross-examination, based on her performance file, Mrs. Hernandez had to concede a series of critical comments in 1961, in 1962, and in 1964. The criticisms made in 1961 and 1962 impress us less on close analysis, partly because they seem for the most part to be minor and technical (e.g., "incorrect busy test on several occasions") and partly because the Company inexplicably omitted all of the comments made as to Rosa Figueroa in 1963—which were generally commendatory. The pattern is consistent with Mrs. Hernandez' observation that she was improving. However, the evidence of criticisms made in 1964, after Mrs. Hernandez had left the Company, is more significant and more adverse. In the first three months of 1964, overall criticism as to Rosa Figueroa's attitude and unbusinesslike conduct were noted, culminating with a serious complaint from a subscriber. These were unrebutted.

In our view this adverse evidence, uncontroverted by plaintiff Figueroa, is so substantial in relation to the favorable evidence that we can only conclude that the jury could not reasonably have found that she was as useful as any of the less senior retained employees. The Company could have attempted to introduce such evidence as to the other plaintiffs, but did not. Insofar as Mrs. Hernandez was impeached, her assessment was destroyed only as to Figueroa, not so much by her statement about lack of complaints as by the evidence of performance after her separation. The evidence is admittedly not so specific or precise as we should like or as could have been obtained through discov-

ery but we think it is sufficient and that the matter should rest with the jury's verdicts, except as to Rosa Figueroa.

Damages

The Company is therefore liable for damages to all plaintiffs except Rosa M. Figueroa and Elsie Lugo Bernier (*see* n. 3). The Union is immune, because of the running of the applicable statute of limitations, from any liability for its breach. The initial problem is to determine the amount of lost earnings properly chargeable to the Company. Neither the Company nor the Union contested the total amount found by the jury as lost earnings for these five plaintiffs incurred up to the date of judgment.[11].

We look again to *Vaca* v. *Sipes*, this time for guidance on the allocation of lost earnings where the Company improperly discharges and the Union unfairly represents. *Vaca* establishes that only the Company is liable for damages attributable solely to its breach of contract, while the "increases if any in those damages caused by the union's refusal to process the grievance should not be charged to employer." *Vaca* v. *Sipes*, *supra* at 197-98; *see also Czosek* v. *O'Mara*, *supra* at . In a case such as ours, where there has been no suggestion that the Union participated in the Company's improper discharge and where there was no evidence that but for the Union's conduct the plaintiffs would have been reinstated or reimbursed at an earlier date, we conclude that the Union's conduct cannot be said to have increased or contributed to the damages attributable to the Company's improper discharge. Thus, the entire amount of lost earnings of each plaintiff, *see* n. 11, is properly charged to the Company.

11

Plaintiff	*Lost Earnings*
Andrea Colon Tubens	$14,981.93
Iris Trabel Quintana	6,851.86
Luz Arminda Toro Tirado	3,454.28
Carmen de la Rose de Ortiz	2,654.32
Elsie Torres Ramos	5,628.60

Additionally, plaintiffs request an award of prejudgment interest on their "lost earnings" recovery. Such interest has been awarded by the NLRB in back-pay cases — *e.g., Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)—and enforced by decisions from at least seven circuits. *See N.L.R.B v. Local 138, Operating Engineers*, 385 F.2d 874, 878 (2d Cir. 1967), and cases cited therein, n. 22. Courts have also awarded such prejudgment interest in cases where the National Railroad Adjustment Board ordered reinstatement and back pay without mention of any interest recovery. *Raabe v. Florida East Coast Railway Co.*, F. Supp. 351, 356 (M.D. Fla. 1966); *Dieringer v. Chicago, Milwaukee, St. Paul, and Pacific R. Co.*, 278 F. Supp. 211, 213 (E.D. Wis. 1968); *compare Ladaj v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 299 F. Supp. 580, 581 (E.D. Wis. 1969).

Such decisions are sound where, in an effort to "make whole" the improperly discharged employee an administrative agency ascertains actual wages lost and the agency or the court supplements them by interest from the date such wages should have been paid. But where a jury has made an award for lost earnings, we think it inappropriate for a judge to attempt to assess interest. In many case the jury's verdict would not supply the basic data of dates and amounts on which interest could fairly be computed. Were we to brook an exception where, as here, the precise computation of the plaintiffs was accepted by the jury, we would in effect be conditioning the right to interest on the happenstance of a precise stipulation precisely followed by a jury. We therefore agree with the action of the district court in refusing to award prejudgment interest.

As compensation for damages incurred *after* the date of the district court's judgment, plaintiffs seek either reinstatement or money damages for future lost earnings, both of which were denied by the district court. Reinstatement has been ordered by various federal courts in suits arising

under the Railway Labor Act. *E.g., Brady* v. *Trans World Airlines, Inc.*, 244 F. Supp. 820, 822 (D. Del. 1965), *aff'd*, 401 F.2d 87, 102-103 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969), *reh'g denied*, 394 U.S. 955 (1969); *Raabe* v. *Florida East Coast R. Co.*, *supra* at 354. The Company insists, however, that the Norris-LaGuardia "anti-injunction" provisions, 29 U.S.C. §§ 101-115 — inapplicable to suits under the Railway Labor Act, *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 41-42 (1957)—bar reinstatement in § 301 suits under the National Labor Relations Act. We disagree.

The Company's literal interpretation of section 4(a) of the Norris-LaGuardia Act[12] completely disregards the primary purpose behind the anti-injunction provisions, "to protect working men in the exercise of organized, economic power . . . to correct existing abuses of the injunctive remedy in labor disputes. . .to prevent the injunctions of the federal courts from upsetting the natural interplays of the competing economic forces of labor and capital." *Trainmen* v. *Chicago R. & I. R. Co.*, *supra*, at 40-41; *see Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 202-203 (1962). Our understanding of the legislative history behind section 4(a) leads us to conclude that that section was not intended as a protection for employers. *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 310 F.2d 513, 517-518 (7th Cir. 1962), *aff'd on other grounds*, 372 U.S. 284 (1963); *Retail Clerks Union Local 1222* v. *Alfred M. Lewis, Inc.*, 327 F.2d 442, 446 (9th Cir. 1964); *see Local Union No. 328* v. *Armour and Co.*, 294 F. Supp. 168 (W.D. Mich. 1968);

---

[12] "No court of the United States shall have jurisdiction to issue any . . . injunction . . . to prohibit any person . . . from . . .

(a) Ceasing or refusing . . . to remain in any relation of employment." 29 U.S.C. § 104(a).

It is possible to read this provision as prohibiting a federal court from enjoining an employer from refusing to reemploy a former employee, even an improperly discharged one.

but see Cline v. *Publishers' Ass'n of New York City*, 214 F. Supp. 520, 528 (S.D. N.Y. 1963), *aff'd on lower court opinion*, 314 F.2d 343 (2d Cir. 1963). The "remain in any relation of employment" language in section 4(a), which forms the basis of the Company's literal interpretation, was used, we think, simply to make clear that employee strikes could not be enjoined either if the employee claimed to have ceased or refused to work temporarily or if they claimed to have completely ended their employment relation with their employer. Moreover, the drafters did specifically include employers when protection was intended for them. *See* section 4(b), 29 U.S.C. § 104(b). Finally, the reemployment of improperly discharged employees can hardly be said to be one of the abuses sought to be eliminated by the Norris-LaGuardia Act. *See* section 2, 29 U.S.C. § 102; *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957). We therefore hold that the remedy of reinstatement in a § 301 suit is not barred by section 4(a) of the Norris-LaGuardia Act.

Absent Norris-LaGuardia Act restraints, the rationale of *Brady* v. *Trans World Airlines, Inc.*, *supra*, applies with equal force under the NLRA. We fail to discern any reason why reinstatement is not a perfectly acceptable form of relief for § 301 suits against the employer. *See Serra* v. *Pepsi-Cola General Bottlers, Inc.*, *supra* at 688; *Rivera* v. *NMU Pension & Welfare & Vacation Plan*, *supra* at 877. In many such cases, reinstatement would have been the likely remedy had the grievance been taken through the grievance procedure as it should have been. *E.g.*, *Machinists, District No. 8* v. *Campbell Soup Co.*, 406 F.2d 1223 (7th Cir. 1969). It is unrealistic to assume that the injury to the improperly discharged employee continues only up to the date of the district court's judgment. In the normal case, reinstatement constitutes one form of prospective relief which has some assurance of making the employee

whole while avoiding the difficult problem of quantifying future lost earnings.

By concluding that reinstatement is an appropriate remedy in a § 301 suit, we do not mean to suggest that it must be ordered in every such case. First of all, there may be some cases in which no prospective relief is warranted.[13] Yet in our case the jury's total award for lost earnings to the date of trial has not been contested, and since there was no evidence that the "loss of employment" injury suffered by plaintiffs as a result of their wrongful discharge suddenly ceased on the date of judgment, it seems likely that plaintiffs' injury continued even after the date of judgment and that some form of prospective relief is appropriate.

Reinstatement still may not be the appropriate form of prospective relief in this case, however, for it may be that the six year delay since discharge has made reinstatement impractical both for the Company and for the plaintiffs, particularly if the present seniority clause is a weak one which is likely to generate future controversy concerning these employees. If such impracticality exists, we can see

[13] *E.g.*, where the employer can demonstrate that the employee would have been properly discharged at some point prior to the date of judgment, or where it appears that the employee had by the date of judgment obtained equivalent employment which mitigated all prospective injury from the improper discharge, neither of which has been suggested by the Company as having occurred in our case. The Company's sole contention in this regard, that no prospective relief should be granted because there was no evidence that plaintiffs were *still* as useful as some less senior employees who were retained in 1964, must be rejected. Even assuming that plaintiffs were no longer as useful, the Company cannot take advantage of its own wrongdoing, for *it* created the situation where some present employees continued to work in place of these plaintiffs who were wrongfully discharged. In similar circumstances, the Third Circuit upheld a lower court order requiring the employer, under much more extreme conditions of obsolescing skills, to train the improperly discharged employee if necessary to return him to the position he would have attained had he not been discharged. *Brady* v. *Trans World Airlines, Inc.*, *supra* at 103.

no reason why an award for future lost earnings would not be in order, *Thompson* v. *Brotherhood of Sleeping Car Porters*, 367 F.2d 489, 494. (4th Cir. 1966) *cert. denied*, 386 U.S. 960 (1967),[14] provided they are apportioned between the Union and the employer along the guidelines of *Vaca* v. *Sipes*, *supra* and *Czosek* v. *O'Mara*, *supra*. Moreover, we think it makes good sense to give the district court an alternative to reinstatement in those cases where some prospective relief is warranted.[15] *Textile Workers* v. *Lincoln Mills*, *supra* at 456-457. The admittedly difficult problems of quantifying future lost earnings should not be allowed to preclude any prospective remedy or to force the parties to accept the more drastic remedy of reinstatement. Of course the employee will only be entitled to recover from the Company for those damages which are reasonably attributable to the discharge and which could not have been mitigated by engaging in substantially equivalent employment.

In this case it is unclear why the district court denied any form of prospective relief. We therefore remand this aspect of the damages question for the district court either to order reinstatement or to submit to a jury, after the

---

[14] *See also Nichols* v. *National Tube Co.*, 122 F. Supp. 726, 732 (N.D. Ohio 1954), *rev'd on other grounds*, 229 F.2d 396 (6th Cir. 1956). Nothing in either *Walker* v. *Southern Railway Co.*, 237 F. Supp. 278 (W.D. N.C. 1965), or *Gass* v. *National Container Corp.*, 171 F. Supp. 441 (E.D. Ill. 1959), persuades us that the Fourth Circuit's *Thompson* decision should not be followed. While *Vaca* may indicate a different apportionment of damages than that made in *Thompson*, nothing in *Vaca* suggests that properly apportioned future damages are an improper remedy.

[15] We recognize that the record below contains little evidence from which future damages could have been calculated. However, there was sufficient evidence to justify a reinstatement order. Since the case must be remanded for new consideration of the propriety of reinstatement, we think it would be unfortunate both for the Company and the plaintiffs if the district court were forced to choose between reinstatement and no prospective relief in a case where some such relief seems warranted.

taking of evidence, the question of the amount of future lost earnings.

Plaintiffs also seek an award of reasonable attorney's fees. While federal courts have awarded attorney's fees as a part of the successful plaintiff's recovery in the labor relations context in the absence of express statutory authorization[16] and while we are inclined to think that such relief could be appropriate in a § 301 suit such as this one,[17] we think the circumstances presented in this case preclude such relief. Normally such relief should be charged against the union for its failure to utilize the grievance procedure on the employee's behalf is what necessitated his resort to the Courts. However in our case the Union is immune from liability because of the statute of limitations, and we can find no substantial evidence that the Company could be said to have frustrated the grievance procedures with regard to the plaintiffs still before us. For these reasons, the court's denial of such award is affirmed.

[16] *E.g., Rolax* v. *Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951) (attorney's fees awarded to employee for union's breach of duty of fair representation); *Gartner* v. *Soloner*, 384 F.2d 348 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968) (attorney's fees to union member under § 102, LMRDA); *Sheet Metal Workers, Local 223* v. *Atlas Sheet Metal Co.*, 384 F.2d 101, 109-110 (5th Cir. 1967) (attorney's fees awarded to employer under § 303, NLRA); *Gulf Coast Bldg. & Const. Trades Council* v. *F. R. Hoar & Son, Inc.*, 370 F.2d 746, 748 (5th Cir. 1967) (same).

[17] Mr. Justice Black, dissenting in *Vaca* v. *Sipes*, *supra* at 210, eloquently described the difficult route left open to the employee in this predicament. Moreover, the alleged wrong inflicted on the employee, loss of employment in violation of contractual rights, the anticipated recovery, perhaps too insubstantial to sustain competent counsel's best efforts to obtain redress, and the ultimate purpose behind any recovery in such a case, making the employee whole, all suggest that the employee may need some financial assistance to press his claim and, if successful, should retain a substantial portion of the jury's "lost earnings" award for himself. Finally, the cost of attorney's fees is an injury to the employee directly attributable to and necessitated by the failure of the union and or the employer to utilize the contractual grievance procedures designed to remedy breach of contract claims without resort to the courts.

Finally, we are satisfied that the plaintiffs' request for "mental damages" was properly denied. We think this is a matter of federal labor law and while we can conceive of extreme conduct by either the employer or the union which might in some cases warrant such an award, it seems clear that ours is not that exceptional case. *Cf. Brady* v. *Trans World Airlines, Inc.*, 244 F. Supp. at 822.

The case is remanded to the District Court to enter judgment against the Company for past lost earnings in accordance with this opinion and to determine the propriety of reinstatement or future lost earnings.

Volume II, p. 128 of Record.

IN THE UNITED STATES DISTRICT COURT

(Caption 5114-5)

RULING ON POST TRIAL MOTIONS AND MEMORANDUM.

In this action, following jury trials, all of the parties made post trial motions. The background for those motions will be next set forth. The plaintiffs in this action were all formerly in the employ of the defendant Puerto Rico Telephone Company at Mayaguez. The plaintiffs in this action assert claims against all of the defendants growing out of the alleged wrongful termination of their employment by the defendant Puerto Rico Telephone Company. That defendant was a party to a collective bargaining agreement with the defendant unions. The two Unions were and are treated as one under that agreement. The defendant Union first named was the over-all Union organization for the Commonwealth of Puerto Rico. The other defendant Union was the local Union for the defendant Puerto Rico Telephone Company. Those defendants will be referred to as the defendant Union or the defendant Unions.

The action was designated by the plaintiffs as a jury case. The action was dismissed without prejudice as to the plaintiffs Iris Torres de Hernandez and Benjamin Torres Rivera for lack of jurisdiction. At the close of the evidence a verdict was directed in favor of the defendants as to the claims of the plaintiffs Jose A. Franqui and Alfredo Moreau Irizarry. Jury trials were had as to the claims of the remaining seven plaintiffs. Those plaintiffs were switchboard telephone operators in the Traffic Department of the defendant Telephone Company. In accord with jury verdicts, judgments for substantial amounts were rendered in favor of each of those plaintiffs. In the case of six of those plaintiffs, judgments were rendered against

all of the defendants. In the case of the seventh of those plaintiffs, i.e., Elsie Lugo Bernier, judgment was rendered in her favor only as against the defendant Telephone Company. The claims of those seven plaintiffs are the subject matter of this Memorandum. Hereafter when reference is made to the plaintiffs reference will be to those plaintiffs.

There was a separation as to the trial of the issues. One jury rendered special verdicts as to certain of the issues and another jury rendered special verdicts as to the remaining issues. The seven plaintiffs and the dates of the commencement of their employment and the termination of their employment by the defendant Telephone Company are next set forth:

Name	*Started Working*	*Was Separated*
Rosa M. Figueroa de Arroyo	May 26, 1960	Apr. 3, 1964
Andrea Colon Tubens	May 20, 1953	Apr. 3, 1964
Iris Trabal Quintana	May 15, 1961	Apr. 3, 1964
Luz Arminda Toro	Apr. 21, 1950	Apr. 8, 1964
Carmen E. de la Rosa de Ortiz	Aug. 16, 1956	Apr. 3, 1964
Elsie Torres Ramos	Mar. 27, 1961	Apr. 3, 1964
Elsie Lugo Bernier	June 12, 1961	Sept. 19, 1963

It appears that the number of employees in the Traffic Department was reduced because of the introduction of automatic switching.

At the times here material, there was in effect between the defendant Telephone Company and the two defendant Unions a collective bargaining agreement. Article XX of the collective bargaining agreement was as follows:

"Seniority

"Seniority shall be the full term of service credited to an employe working for the Company as reflected by the Company's records.

"The Company shall take into consideration all the employe's qualifications in the case of promotions and layoffs in jobs covered by this Agreement.

"Seniority shall prevail if the qualifications of all

the employes to be considered are equal, but shall not be used against any employe that because of his ability, competence, efficiency and better service record proves to be more useful than some other that has merely been employed for a longer period of time."

Section 5 of Article XV of the collective bargaining agreement was as follows:

"Section 5 Suspended or Laid-off Employees

"a) If an employe regards his suspension or laying-off as unjust, he shall submit his grievance to the Union.

"b) In case the Union also regards the employe's suspension or laying-off as unjust, the Union shall submit a grievance in writing, within the three (3) days following the employe's suspension or notice of laying off, to the Company's Director of Industrial Relations.

"c) The Company shall have the right to summon the Grievance Committee to a special meeting to settle the grievance.

"d) Once the period of three (3) days from the employe's suspension or notice of laying-off shall have elapsed, the Union shall have no right to file a grievance on said suspension or notice of laying off and the case shall be regarded as closed.

"e) Any employe that has been suspended or laid-off shall, if his suspension or laying off is found to be unjustified in the Grievance Committee's judgment, be restored to his old job without detriment to his seniority rights, and the Company shall be required to pay him any money he may have failed to earn during his suspension or laying-off."

It is the claim of the plaintiffs that their employment was terminated by the defendant Telephone Company in violation of the seniority provsion of the collective bargaining agreement. It is the claim of the plaintiffs that the defendant Unions wrongfully failed to submit their grievances for such violation to the defendant Telephone Company in accord with the provision of the collective bargaining agreement.

During the times here material, Armando Sanchez Martinez was president of the defendant Sindicato de Trabajadores Packinghouse, AFL-CIO, Distrito de Puerto Rico, which as heretofore noted, was the over-all Union organization for the Commonwealth of Puerto Rico.

On September 13, 1963, the defendant Telephone Company was notified in writing by the defendant Union as to its representatives under the collective bargaining agreement. Included among those so designated was Carmen Acevedo. Following her name appeared the word "Traffic." Miss Acevedo was employed in the Traffic Department along with the plaintiffs. There were around 30 employees in the Traffic Department. Promptly upon receiving notice of the termination of their employment, the plaintiffs notified Carmen Acevedo that they deemed themselves aggrieved by the termination of their employment. Mr. Sanchez early learned that the plaintiffs were claiming that they had been aggrieved by the termination of their employment.

The first of the issues between the parties was as to whether the defendant Telephone Company violated the seniority provision of the collective bargaining agreement. In that connection the jury was instructed as follows:

"Instruction No. 4.

"The provisions of Article XX of the collective bargaining agreement have been heretofore set forth.

"That Article does not in any way limit the right of

the Company to lay off an employee no longer needed. It had the absolute right to so do. Thus, the right of the Company to reduce the number of employees in its Traffic Department is not involved. What is involved is the selection of employees to be laid off. Under Article XX seniority is only one of the factors to be considered by the Company in selecting the employees to be separated and those to be retained. Seniority is determinative only where the factors of ability, competence, efficiency, service, and usefulness to the Company are equal.

"Each plaintiff asserts that at the time she was laid off the Company retained in its Traffic Department employees with lesser seniority than she had. Each plaintiff further asserts that she had qualifications equal to those of the employees retained as to ability, competence, efficiency, service, and usefulness to the Company.

"The burden is upon each plaintiff to establish by a preponderance of the evidence that her qualifications in the matters referred to were equal to those who were retained. If she has so established, your answer to Question No. 1 in the special verdict relating to her should be 'yes'. If she has not so established, then your answer to Question No. 1 as to her should be 'no'."

The jury returned special verdicts finding that in the case of each plaintiff the defendant Telephone Company had violated the seniority provision of the collective bargaining agreement. That jury, in addition to finding that the defendant Telephone Company had violated the seniority provision of the collective bargaining agreement as to each of the plaintiffs, also found that the plaintiffs had submitted their grievances to the Union in accord with the provision of the collective bargaining agreement.

Thereafter, there was submitted to another jury the issue as to the defendant Union's conduct in connection with the plaintiff's grievances and the matter of damages. That jury was instructed, in part, as follows:

"Subsection (b) of Section 5 of Article XV of the collective bargaining agreement provides that if the Union regards an employee's 'suspension or laying-off as unjust' it shall submit the grievance to the Company in accord with that subsection.

"Under the provisions of that subsection, the Union is not required to submit to the Company all grievances of its members relating to layoffs. It is only required to submit such of those grievances which it regards as just grievances. That subsection provides for the exercise of judgment on the part of the Union as to what grievances it will submit to the Company. The requirement of that subsection is that the Union exercise its judgment as to the submissions of such grievance nonarbitrarily, nondiscriminatorily and in good faith. If it does so exercise its judgment, it would not have acted wrongfully even though it made a mistake in judgment and an erroneous decision in not submitting to the Company a grievance which in fact was a just grievance.

"In order for the Union to have acted wrongfully in not submitting a grievance to the Company in accord with subsection (b) of Secton 5 of Article XV of the collective bargaining agreement, it must have acted either arbitrarily or discriminatorily or in bad faith. The burden is upon each plaintiff to establish by a preponderance of the evidence that the Union did so act.

"

"To act 'arbitrarily' means to act perfunctorily and without heed or regard as to the merits of a particular

matter. It also means not governed by principle but acting according to preference, notion, whim or caprice.

"To act 'discriminatorily' means to act unfairly as to one person as compared to others similarly situated.

"To act 'in bad faith' is to act with improper intent, motive and purpose."

Except in the case of the plaintiff Elsie Lugo Bernier, it is undisputed that the defendant Unions did not submit the grievances of the plaintiffs that their employment was terminated in violation of the collective bargaining agreement. In her case the defendant Unions submitted her grievance but it became bogged down in arbitration proceedings.

That jury found that as to each of the plaintiffs, except the plaintiff Elsie Lugo Bernier, the defendant Union had either arbitrarily or discriminatorily or in bad faith failed to submit her grievance to the defendant Telephone Company in the manner and form specified in subsection (b) of Section 5 of Artcle XV of the collective bargaining agreement. It was just noted that the defendant Union had submitted the grievance of the plaintiff Elsie Lugo Bernier, but through no fault of the defendant Union redress of her grievance was not secured.

Each of the plaintiffs claimed as damages her loss of earnings, the same being the difference between what she would have earned between the time of the termination of her employment and what she did earn up to the time of trial. The jury returned verdicts determining the amount of such loss in the case of each plaintiff.

The defendant Telephone Company asserts that the evidence was not sufficient to sustain the special verdicts of the jury finding that it had violated the seniority provision of the collective bargaining agreement.

The Court is of the view that the evidence is sufficient to support those verdicts.

The defendant Union asserts that the evidence is not sufficient to support the special verdicts of the jury that the plaintiffs, except the plaintiff Elsie Lugo Bernier, did submit their grievances to the Union as provided in the collective bargaining agreement. It was heretofore noted that the jury found that the defendant Telephone Company had violated the seniority provision of the collective bargaining agreement as to each of the plaintiffs. It is the claim of the defendant Union that evidence is lacking that the plaintiffs made known to the defendant Union that it was their claim that their employment had been terminated in violation of that agreement. Each of the plaintiffs notified Miss Acevedo, the defendant Union's designated representative, as to her dissatisfaction with the termination of her employment. Miss Acevedo, as heretofore noted, was an employee in the same department as the plaintiffs. That department was not a very large department, and Miss Acevedo would undoubtedly have had personal acquaintance with all of the members of that department and their periods of service. She undoubtedly would have known that switchboard operators were being retained who were junior in service to the plaintiffs. All of the plaintiffs and all those with lesser seniority released by the defendant Telephone Company were members of the Union. They all had the same ethnic background. The only possible ground of complaint of the plaintiffs would have to be based upon the violation of the seniority provision, and it would seem improbable that Miss Acevedo did not understand that the plaintiffs were complaining that their employment was being terminated in violation of the seniority provision of the collective bargaining agreement.

It is the view and holding of the Court that the claim

of the defendant Union as to the insufficiency of the evidence is not well founded.

In connection with the matter of damages, the jury was instructed as follows:

"Instruction No. 8.

"You will make a determination as to the loss of earnings of each plaintiff from the time of her layoff up to February 29, 1968.

"That loss in the case of a particular plaintiff would be the difference between what she has earned since her layoff up to February 29, 1968, and what she would have earned during that period had she been continued in the employment of the Company. Amounts paid by an employer for medical benefit protection for and in behalf of an employee are to be included in the earnings of such employee. Amounts received by an employee during maternity leave are includable in her earnings. You need not give consideration to the matter of unemployment compensation, vacation allowance or sick leave.

"It was the duty of each plaintiff after her layoff to use reasonable diligence and reasonable means to secure employment she could reasonably be expected to perform in order to diminish her loss of earnings occasioned by her layoff. Any loss of earnings attributable to her failure to so do should not be included by you in fixing the amount of her loss of earnings.

"The burden is upon each plaintiff to establish by a preponderance of the evidence the proper amount of her loss of earnings."

The jury was further instructed as follows in connection with the matter of damages:

"Instruction No. 10.

"If you find that the Union acted arbitrarily, discriminatorily or in bad faith in connection with the

grievance of any plaintiff, you will give consideration to the matter of the responsibility, if any, of the Union for a proportionate share of her damages.

"The layoff of the plaintiffs was the action and the responsibility of the Company. It was not the action of the Union and it did not have nor does not have any responsibility for such layoff. The responsibility of the Union did not commence until after that action by the Company. It was the Union's responsibility to deal with the grievance of each plaintiff as to her being laid off in violation of the seniority provision of the collective bargaining agreement nonarbitrarily, nondiscriminatorily and in good faith.

"The proportion of the total loss of earnings sustained by each plaintiff because the Union acted arbitrarily, discriminatorily or in bad faith in connection with her grievance would be that proportion which would represent the increase of her loss of earnings because of such conduct.

"You will determine on a percentage basis what proportion of the loss of earnings of each plaintiff would properly be attributable to the Union's wrongful conduct. You are instructed that the percentage could vary in each case."

The jury, after determining the entire loss of earnings of each plaintiff due to the termination of her employment, determined that in the case of six of the plaintiffs the defendant Unions were liable for 40 per cent thereof. In the case of the plaintiff Elsie Lugo Bernier, the jury determined that the defendant Telephone Company was liable for 100 per cent thereof.

Jurisdiction in this case is based upon the provision of the Labor Management Relations Act of 1947, 29 U.S.C.A. Sec. 141 et seq. It is the claim of the defendants

that they are not liable to the plaintiffs under the applicable law.

In the present case the plaintiffs assert liability against the defendant Telephone Company based upon the violation of the seniority provision of the collective bargaining agreement between the defendant Union of which they were members and the defendant Telephone Company. The leading case on the right of a member of a union to maintain an action against his or her employer and the union of which he ir she is a member, based upon a collective bargaining agreement between his or her employer and his or her union, is the case *Vaca* v. *Sipes* (1967), 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842. In that case the situation was that a member of a union had been discharged by his employer, Swift & Company. The member claimed that his discharge was in violation of the collective bargaining agreement between his employer and his union. He sought to recover damages from his union for allegedly having "arbitrarily, capriciously and without just or reasonable reason or cause" refused to take his grievance with Swift & Company to arbitration under the fifth step of the bargaining agreement's grievance procedure. An action in state court was instituted. Upon review of that proceeding, the United States Supreme Court stated some of the rules applicable in actions similar to the present action. In that case the Court held that before a discharged employee may proceed to the courts for relief he must establish that he has exhausted the grievance procedures provided in the collective bargaining agreement so far as he is able to do. In that case the Court stated that where the discharge is wrongful it is the employer that has committed a breach of the collective bargaining agreement and that the only responsibility of the Union is in connection with the handling of the employee's grievance in con-

nection with the alleged wrongful discharge. In that case the Court stated (p. 187 U.S.)

> "If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the *union's breach of duty will have enhanced or contributed to the employee's injury.* What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct—or the injured employee would be forced to go to two tribunals to repair a *single* injury. * * *" (Emphasis supplied.)

In the present case it was the jury determination that the defendant Telephone Company discharged each of the plaintiffs in violation of the seniority provision in the collective bargaining agreement. It was also the jury determination, except in the case of the plaintiff Elsie Lugo Bernier, that the defendant Union was at fault in failing to submit her grievance for such wrongful discharge with the defendant Telephone Company as provided for and required by the collective bargaining agreement. In the case of each of the plaintiffs, except in the case of Elsie Lugo Bernier, it was the jury determination that the damages from the original injury were thereby enhanced 40 per cent. In the case of the plaintiff Elsie Lugo Bernier, it was the jury determination that the defendant Union had exhausted in her behalf the grievance procedure provided for and required by the collective bargaining agreement and that all of her damages were properly chargeable to the defendant Telephone Company.

It is the ruling of the Court that the judgments rendered

in this case against the defendants were in accord with the law as established by *Vaca v. Sipes, supra.*

It is the claim of the defendants that the claims of the plaintiffs are barred by the statute of limitations. The case of *Auto Workers v. Hoosier Cardinal Corporation* (1966), 383 U.S. 696, 87 S. Ct. 903, 17 L. Ed. 2d 242, is of importance as to the matter of the statute of limitations. In that case the plaintiff union and the defendant, Hoosier Cardinal Corporation, were parties to a collective bargaining agreement. The location of the employment was in Indiana. The employer discharged a number of employees. The union claimed that the discharged employees were entitled to accumulated vacation pay which had not been paid them. Four years later the union brought an action in behalf of the discharged employees for such pay. The employer asserted that the claims asserted were barred by the statute of limitations. The United States Supreme Court held that there was no federal statute of limitations applicable to actions based upon a collective bargaining agreement. That Court further held that the appropriate state statute of limitations was applicable. In the present case the applicable statute of limitations is that of the Commonwealth of Puerto Rico. In the case of *Auto Workers v. Hoosier Cardinal Corporation, supra*, the District Court regarded the action as based partially upon the written collective bargaining agreement and partially upon the oral employment contract each employee had made. It held that Indiana would apply to such an action its six-year statute governing contracts not in writing. The Supreme Court accepted that interpretation.

It was heretofore noted that the employment of five of the plaintiffs was terminated on April 3, 1964; that the employment of one plaintiff was terminated on April 8, 1964; and that the employment of another plaintiff was terminated on September 19, 1963. The complaint in the

present action was filed on November 22, 1965. It is the claim of the defendant Unions that the claims of the plaintiffs are barred by the one-year statute of limitations fixed for actions based on fault or negligence by Article 1868 of the Civil Code of Puerto Rico, 31 L. P. R. A. Section 5298. The defendant Telephone Company makes the same claim. It is also the claim of the defendant Telephone Company that the claims of the plaintiffs are barred by the provision of Section 160(b), Title 29 U.S.C.A., which requires that complaints as to unfair labor practices be made within six months after their occurrence.

It would seem that the clear interpretation of the holding in the case of *Auto Workers* v. *Hoosier Cardinal Corporation*, *supra*, is that it is the local statute of limitations rather than the provision of Section 160(b), Title 29 U.S. C.A., which governs the time for the bringing of court actions for breach of a collective bargaining agreement. It seems clear that if the present action is to be characterized as an action for breach of contract, it would not fall within the scope of Article 1868 of the Civil Code of Puerto Rico relied on by the defendants.

It is the view of the Court that the basic character of the claim of each of the plaintiffs is that of an action based upon the breach of contract, that breach being a breach of the seniority provision of the collective bargaining agreement. Each plaintiff seeks to recover her loss of wages based upon that breach. Each seeks to recover from the defendant Unions the enhancement of her loss by them. The defendant Unions, in substance, claim that the claim of each plaintiff consists of two causes of action, one against the defendant Telephone Company and another against the defendant Unions.

The opinion in the case of *Vaca* v. *Sipes*, *supra*, refers to the action of the employee against his employer and his union as being an action for a "single injury" (187 U.S.). In that same case the Court points out (p. 187 U.S.) that

it is the employer who breached the contract and that the union's responsibility has to do with the enhancement of the damages sustained by the employee.

In the case of *Fischer* v. *Brotherhood of Railroad Trainmen* (D. C. Mo. 1968), 284 F. Supp. 491, a railroad employee brought an action in state court against his employer and his union because of his discharge. The action was removed to federal court. If the claims against the employer and the union were separate and independent claims or causes of action, the case was properly removed. The Court held that the case was not removable. The Court, after referring to a number of authorities, stated (p. 493):

> "In light of these authorities, we do not believe it can fairly be said that plaintiff's action against the two parties can be said to present separate and independent claims or causes of action but that plaintiff seeks to recover for a single wrong in which damages must be apportioned between the defendants * * *."

It is the view of the Court that in the present case each of the plaintiffs made one basic claim and that was that the defendant Telephone Company had breached its contract of employment by a violation of the seniority clause, the damages for which breach were enhanced by the conduct of the defendant Unions.

It is the holding of the Court that the claims of the plaintiffs are not barred by the statute of limitations.

Five of the plaintiffs during the period they were unemployed received unemployment compensation under the provisions of the Puerto Rico Employment Security Act, Title 29, L. P. R. A., Sections 701-717. Those plaintiffs and the amounts received by them are as follows:

Rosa M. Figueroa de Arroyo	$208.00
Andrea Colon Tubens	208.00
Iris Trabal Quintana	416.00
Luz Arminda Toro Tirado	208.00
Elsie Torres Ramos	416.00

In the judgment entered in this action the Court directed that the amounts of those payments be deducted from the amounts fixed by the jury as damages. In their post-trial motions those plaintiffs move that the judgment be amended to eliminate such deductions. It appears from the authorities that those plaintiffs are entitled to such elimination. *Magelssen* v. *Local Union No. 518, Operative Plasterers, etc.* (D. C. 1965), 240 F. Supp. 259, 263; *Pennington* v. *Whiting Tubular Products, Inc.* (1963), 370 Mich. 590, 122 N. W. 2d 692.

It Is Hereby Ordered that the judgment heretofore entered herein be amended to eliminate the provision contained therein deducting the amount of the unemployment compensation payments from the amount of damages recoverable by those plaintiffs.

It Is Further Ordered that the judgment in favor of those plaintiffs against the defendants be increased accordingly.

The parties made a number of contentions other than those referred to. The Court has considered them. It is of the view that not any of them are well founded.

It Is Further Ordered that, save as to the amending of the judgment in regard to the matter of unemployment compensation payments, all of the post-trial motions of the parties be and they are hereby in all respects overruled and denied.

Dated August 6, 1969.

s/ HENRY N. GRAVEN,
Henry N. Graven,
Senior United States District Judge
(By Assignment)

Volume II, p. 118 of Record.

IN THE UNITED STATES DISTRICT COURT.

(Caption—511-65)

Judgment.

In accord with the rulings of the Court heretofore made;

It Is Hereby Ordered and Adjudged that this action be and the same is dismissed without prejudice as to the Plaintiffs Iris Torres de Hernandez and Benjamin Torres Rivera for lack of jurisdiction.

In accord with the action of the Court in sustaining the Motions of the Defendants for Directed Verdicts as to the Plaintiffs Jose A. Franqui and Alfredo Moreu Irizarry;

It Is Further Ordered and Adjudged that their Complaints be and the same are dismissed with prejudice; that those Plaintiffs recover nothing from the Defendants herein; and that as to them final judgment in this action be and the same is hereby rendered in favor of the Defendants.

In accord with the verdicts of the juries herein, judgments are rendered as next set forth herein with the Defendant Puerto Rico Telephone Company designated as the Company and the other two Defendants being designated as the Union.

It Is Further Ordered that as to the Plaintiffs next listed there be deducted from the amounts fixed by the jury as to their damages the amount of the unemployment compensation payments received by them. The Plaintiffs and the amount of the deductions are as follows:

Name	Amount Deducted
Rosa M. Figueroa de Arroyo	$208.00
Andrea Colón Tubens	208.00
Iris Trabal Quintana	416.00
Luz Arminda Toro Tirado	208.00
Elsie Torres Ramos	416.00

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff

Rosa M. Figueroa de Arroyo and against the Defendant Company in the sum of Six Thousand Three Hundred Fifteen and 34/100 Dollars ($6,315.34) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Rosa M. Figueroa de Arroya and against the Defendant Union in the sum of Four Thousand Two Hundred Ten and 22/100 Dollars ($4,210.22) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Andrea Colon Tubens and against the Defendant Company in the sum of Seven Thousand One Hundred Eighty-Nine and 16/100 Dollars ($7,189.16) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Andrea Colon Tubens and against the Defendant Union in the sum of Four Thousand Seven Hundred Ninety-two and 77/100 Dollars ($4,792.77) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Iris Trabal Quintana and against the Defendant Company in the sum of Four Thousand One Hundred Eleven and 15/100 Dollars ($4,111.15) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Iris Trabal Quintana and against the Defendant Union in the sum of Two Thousand Seven Hundred Forty and 71/100 Dollars ($2,740.71) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be

and the same is hereby rendered in favor of the Plaintiff Luz Arminda Toro Tirado and against the Defendant Company in the sum of Two Thousand Seventy-two and 57 100 Dollars ($2,072.57) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Luz Arminda Toro Tirado and against the Defendant Union in the sum of One Thousand Three Hundred Eighty-one and 71 100 Dollars ($1,381.71) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Carmen E. de la Rosa de Ortiz and against the Defendant Company in the sum of One Thousand Five Hundred Ninety-two and 59 100 Dollars ($1,592.59) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Carmen E. de la Rosa de Ortiz and against the Defendant Union in the sum of One Thousand Sixty-one and 73 100 Dollars ($1,061.73) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Elsie Torres Ramos and against the Defendant Company in the sum of Three Thousand Three Hundred Seventy-seven and 16 100 Dollars ($3,377.16) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Elsie Torres Ramos and against the Defendant Union in the sum of Two Thousand Two Hundred Fifty-one and

44/100 Dollars ($2,251.44) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that judgment be and the same is hereby rendered in favor of the Plaintiff Elsie Lugo Bernier and against the Defendant Company in the sum of Two Thousand Six Hundred Twenty-three and 82/100 Dollars ($2,623.82) with interest thereon at the rate of six per cent (6%) per annum from this date.

It Is Further Ordered and Adjudged that the request of the Plaintiffs for reinstatement be and the same are hereby denied.

It Is Further Ordered and Adjudged that the request of the Plaintiffs for attorneys' fees be and the same are hereby denied.

It Is Further Ordered and Adjudged that the request of the Defendants for arbitration be and the same are hereby denied.

It Is Ordered that no costs be taxed in favor of any of the parties.

Dated March 6, 1968.

s/ Henry N. Graven,
Henry N. Graven,
Senior United States District Judge.
(By Assignment)

OCT 14 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 522

ROSA M. FIGUEROA DE ARROYO, IRIS TORRES DE HERNANDEZ, ANDREA COLON TUBENS, IRIS TRABAL QUINTANA, JOSE A. FRANQUI, LUZ ARMINDA TORO TIRADO, BENJAMIN TORRES RIVERA, CARMEN E. DE LA ROSA DE ORTIZ, ELSIE TORRES RAMOS, ALFREDO MOREU IRIZARRY, ELSIE LUGO BERNIER,

Petitioners,

vs.

PUERTO RICO TELEPHONE COMPANY,

and

SINDICATO DE TRABAJADORES PACKINGHOUSE, AFL-CIO, DISTRITO DE PUERTO RICO AND UNION DE EMPLEADOS DE LA INDUSTRIA DEL TELEFONO DE PUERTO RICO, LOCAL 963,

Respondents.

BRIEF OF RESPONDENT PUERTO RICO TELEPHONE COMPANY IN OPPOSITION.

JAMES M. POWELL,
GALA, LANE & POWELL,
Suite 705,
1250 Connecticut Avenue,
Washington, D. C. 20036;

FERNANDO RUIZ SUBIA,
MCCONNELL, VALDES, KELLY & SIFRE,
G. P. O. Box 4225,
San Juan, Puerto Rico
00936,

Attorneys for Respondent Puerto Rico Telephone Co.

MATTHEW E. MURRAY,
RICHARD L. MARCUS,
R. THEODORE CLARK, JR.,
JOEL H. KAPLAN,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
111 West Jackson Blvd.,
Chicago, Illinois 60604.

TABLE OF CONTENTS.

	PAGE
Questions Presented	2
Constitutional Provisions Involved	2
Reasons for Denying the Writ	3
Conclusion	8
Supplement to Petition for a Writ of Certiorari in No. 385	9

TABLE OF CITATIONS.

Cases.

Bailey v. Netter, 266 F. Supp. 165 (E. D. La. 1967)	6
Banco Popular de Puerto Rico v. Deliz, 407 F. 2d 1388 (1st Cir. 1969)	7
Bazarte v. United Transportation Union, No. 18,464 (3rd Cir. 1970), 163 Daily Lab. Rep. A-3 (Aug. 21, 1970)	9, 10
Boeing Co. v. Shipman, 411 F. 2d 365 (5th Cir. 1969)	3, 4
Boilermakers v. Rafferty, 348 F. 2d 307 (9th Cir. 1965)	7
Dehydrating Process Co. v. A. O. Smith Corp., 292 F. 2d 653 (1st Cir.), *cert. denied*, 368 U. S. 931 (1961)	4
Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U. S. 714 (1967)	6, 7
Galloway v. U. S., 319 U. S. 372 (1943)	3
Lee v. New Haven Printing Pressmen Local Union No. 74, 255 F. Supp. 929 (D. Conn. 1966)	6
Leonard v. M. I. T. Employees' Union, 225 F. Supp. 937 (D. Mass. 1964)	7

Local 164, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 368 U. S. 95 (1962) 3

Magelssen v. Local Union No. 518, 240 F. Supp. 259 (W. D. Mo. 1965) 7

McGraw v. United Assoc. of Journeymen & Apprentices, 341 F. 2d 705 (6th Cir. 1965) 6

Mogge v. District No. 8, IAM, 387 F. 2d 880 (7th Cir.), *cert. denied*, 391 U. S. 936 (1968) 5, 6

New Park Mining Co. v. United Steelworkers of America, 288 F. 2d 225 (10th Cir. 1961) 7

Pan American World Airways v. Ramos, 357 F. 2d 341 (1st Cir. 1966) 7

Vaca v. Sipes, 386 U. S. 171 (1967) 5

Vars v. International Brotherhood of Boilermakers, 215 F. Supp. 943 (D. Conn.), *aff'd* 320 F. 2d 567 (2d Cir. 1963) 7

Wilkerson v. McCarthy, 336 U. S. 53 (1949) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 522.

ROSA M. FIGUEROA DE ARROYO, IRIS TORRES DE HERNANDEZ, ANDREA COLON TUBENS, IRIS TRABAL QUINTANA, JOSE A. FRANQUI, LUZ ARMINDA TORO TIRADO, BENJAMIN TORRES RIVERA, CARMEN E. DE LA ROSA DE ORTIZ, ELSIE TORRES RAMOS, ALFREDO MOREU IRIZARRY, ELSIE LUGO BERNIER,

Petitioners,

vs.

PUERTO RICO TELEPHONE COMPANY,

and

SINDICATO DE TRABAJADORES PACKINGHOUSE, AFL-CIO, DISTRITO DE PUERTO RICO AND UNION DE EMPLEADOS DE LA INDUSTRIA DEL TELEFONO DE PUERTO RICO, LOCAL 963,

Respondents.

BRIEF OF RESPONDENT PUERTO RICO TELEPHONE COMPANY IN OPPOSITION.

Respondent, Puerto Rico Telephone Company, has previously filed a petition for a writ of certiorari, No. 385, docketed July 13, 1970, to review the judgment and decision of the Court of Appeals for the First Circuit entered on April 17, 1970, reported at 425 F. 2d 281 (1st Cir. 1970). A complete statement of the case appears therein.

QUESTIONS PRESENTED.

1. Does the First Circuit's ruling that the evidence was insufficient to support Plaintiff Rosa Figueroa's claim of wrongful discharge raise a constitutional question or a substantial question involving unsettled principles of federal law?

2. Does the First Circuit's finding that the Union did not breach its duty of fair representation vis-a-vis Plaintiff Elsie Lugo Bernier raise any substantial question for decision by this Court?

3. Does the First Circuit's rejection of Plaintiffs' claim for attorney's fees raise a substantial question for decision by this Court?

CONSTITUTIONAL PROVISIONS INVOLVED.

"AMENDMENT VII.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

REASONS FOR DENYING THE WRIT.

I. THE FIRST CIRCUIT'S RULING AS TO THE INSUFFICIENCY OF THE EVIDENCE SUPPORTING PLAINTIFF ROSA FIGUEROA'S CLAIM OF WRONGFUL DISCHARGE RAISES NEITHER A SIGNIFICANT CONSTITUTIONAL QUESTION NOR AN UNSETTLED PRINCIPLE OF FEDERAL LAW.

It is well settled that the setting aside of a jury verdict by a court on the ground of insufficiency of the evidence does not violate the Seventh Amendment. *Galloway* v. *U. S.*, 319 U. S. 372 (1943); *Boeing Co. v. Shipman*, 411 F. 2d 365, 374 n. 13 (5th Cir. 1969). The question they is what is the appropriate standard for a reviewing court to judge the sufficiency of the evidence.

At the outset, it is clear that since this is a § 301 action, federal law governs. *Local 164, Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Lucas Flour Co.*, 368 U. S. 95, 103 (1962). As such, the appropriate standard, utilized by the First Circuit here, 425 F. 2d at 288-289, and other circuits as well, *see, e.g., Boeing Co.* v. *Shipman*, *supra*, 411 F. 2d at 375 n. 16, is whether there is substantial evidence upon which reasonable men could differ.[1] Under this standard, given the uncontroverted and extensive criticism of Plaintiff Figueroa's performance as a telephone operator in 1961, 1962 and 1964 by her supervisor, the only witness proferred by Plaintiffs to testify as to the comparative abilities of Plaintiffs vis-a-vis junior employees, the First Circuit was eminently correct in ruling

1. Plaintiffs' contentions that the First Circuit utilized the scintilla of evidence test is refuted by the plain words of that Court: "We require *more* than a scintilla." 425 F. 2d at 288 (Emphasis added).

that the evidence indicating that Plaintiff Figueroa was improperly dismissed was plainly insufficient.'

Plaintiffs contend that this standard of review is inappropriate in that it conflicts with the standard adopted by this Court in FELA and Jones Act cases. *See, e.g., Wilkerson v. McCarthy*, 336 U. S. 53 (1949). But, as noted by the 12-1 en banc decision of the Fifth Circuit in *Boeing, supra*, 411 F. 2d at 372, 373:

> "Though we have heretofore adopted in Planters Manufacturing Co. v. Protection Mut. Ins. Co., 5 Cir., 1967, 380 F. 2d 869, the FELA test of the sufficiency of evidence to create a jury question as a uniform federal standard fashioning a rule of general application, we now reject the *Planters* principle and hold that the FELA test is peculiar to that kind of case as a consequence of the statute itself and is accordingly not applicable in non-FELA jury trials.
>
> * * * * *
>
> "Although the Supreme Court has not answered the question of law, no Circuit Court of the United States, other than the Fifth Circuit, has held that the FELA test of sufficiency of evidence is applicable in non-FELA cases. . . ."

In so ruling, the Fifth Circuit relied on the First Circuit's decision in *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F. 2d 653, 656 n. 6 (1st Cir.), *cert. denied*, 368 U. S. 931 (1961), which, in specifically rejecting the FELA standard, noted that such cases had to be considered "on their own bottom" and that:

> "We do not appear to have considered this question ourselves, but a number of other circuits have reached this result without even discussion."

In sum, the standard of review urged by Petitioners before this Court is presently the rule of no Circuit, and the one Circuit that had previously adopted it has recently and decisively, in an en banc proceeding, quite properly rejected it. Therefore, this issue is one upon which certiorari should be denied.

II. THE FIRST CIRCUIT'S DENIAL OF ANY RELIEF FOR PLAINTIFF ELSIE LUGO BERNIER DOES NOT RAISE A SIGNIFICANT ISSUE BEFORE THIS COURT.

The First Circuit found that, although there was a complete absence of hostility or bad faith, the Union here breached its duty of fair representation toward six Plaintiffs by its failure to file grievances for them. As for Plaintiff Elsie Lugo Bernier, however, the Court ruled that since the Union took her grievance to impasse and since the jury found no breach of the Union's duty of fair representation in her case, her claim was barred.

In so ruling as to Plaintiff Bernier, the First Circuit was clearly correct. Under *Vaca* v. *Sipes*, 386 U. S. 171 (1967), an individual employee has no absolute right to have his or her grievance taken to arbitration. Under *Vaca*, in the absence of a breach of its duty of fair representation, a union's decision not to press a grievance beyond any particular stage in the grievance procedure, as the Union here decided, is final and binding on that individual. Plaintiffs seem to contend, however, that because a jury determined that the Company had breached its collective bargaining contract by discharging Plaintiff Bernier, she should now recover. The simple answer to this contention is found in this Court's decision in *Vaca*, *supra*, 386 U. S. at 192-193:

> ". . . if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial."

Nor does *Moggie* v. *District No. 8, IAM*, 387 F. 2d 880 (7th Cir.), *cert. denied*, 391 U. S. 936 (1968), lend any sup-

port to Plaintiffs' position. There, Plaintiff *and her union* brought suit for breach of contract which the employer resisted on the grounds that no collective bargaining agreement was in existence. As such, it was not a suit merely by an individual employee under § 301. Given the fact that the union had joined the employee as a plaintiff in the suit, the court's order of arbitration was appropriate under *Vaca*. What *Maciae* does, however, is lend support to Respondent's argument (Petition No. 385, pages 24-28) that arbitration was an appropriate remedy in this case, rather than a jury or court determination of the breach of contract issue.

Based upon the foregoing, it is respectfully submitted that the First Circuit's denial of relief to Plaintiff Elsie Lugo Bernier raises no significant issue calling for resolution by this Court.

III. THE FIRST CIRCUIT'S REJECTION OF PLAINTIFFS' CLAIM FOR ATTORNEY'S FEES DOES NOT RAISE A SUBSTANTIAL QUESTION FOR DECISION BY THIS COURT.

In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 717 (1967), this Court held:

> "The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. . . ."

Similarly, in actions under § 301 and under the Labor-Management Reporting and Disclosure Act (LMRDA), courts have generally rejected claims for attorney's fees. *See, e.g., Lee v. New Haven Printing Pressmen Local Union, No. 74*, 255 F. Supp. 929 (D. Conn. 1966); *McGraw v. United Assoc. of Journeymen & Apprentices*, 341 F. 2d 705 (6th Cir. 1965); *Bailey v. Netter*, 266 F. Supp. 165 (E. D. La. 1967); *Vars v. International Brotherhood of Boilermakers*,

215 F. Supp. 943 (D. Conn. 1963), *aff'd* 320 F. 2d 567 (2d Cir. 1963); *Magelssen v. Local Union No. 518*, 240 F. Supp. 259 (W. D. Mo. 1965); *New Park Mining Co. v. United Steelworkers of America*, 288 F. 2d 225 (10th Cir. 1961); *Leonard v. M.I.T. Employees' Union*, 225 F. Supp. 937 (D. Mass. 1964); *Boilermakers v. Rafferty*, 348 F. 2d 307 (9th Cir. 1965).

Plaintiffs' argument for attorney's fees is two-fold: first, "overriding considerations of justice . . . compel such a result," *Fleischmann Distilling Corp., supra*, 386 U. S. at 718; and, second, attorney's fees are recoverable under Puerto Rican law, *Pan American World Airways v. Ramos*, 357 F. 2d 341 (1st Cir. 1966).[2] As for the latter, while Puerto Rican law does provide for attorney's fees given unusual circumstances,[2] the First Circuit has recently indicated that *Ramos* is not to be read broadly and "that it is the exception when counsel fees should be awarded." *Banco Popular de Puerto Rico v. Deliz*, 407 F. 2d 1388, 1390 (1st Cir. 1969). Moreover, the First Circuit specifically found in this case that the Company had not frustrated the grievance procedure in regard to Plaintiffs. To find "obstinancy," which is the governing standard under this statute, in such circumstances, would be to tax the Company for its right to have its day in court.

As for the former, the First Circuit was correct in ruling that if attorney's fees are to be awarded, "such relief should be charged against the union." 425 F. 2d at 293. The Union is, after all, the statutory representative of the employees and, the costs involved, including attorney's fees, to contest an alleged breach of contract by the Employer would fall on the Union, whether the forum be

2. The law considered in *Ramos* was § 44.4(d) of Puerto Rico Rule of Civil Procedure:

> "Attorney's fees. Where a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum for attorney's fees." 357 F. 2d at 342, n.1.

arbitration or a court suit. By not processing Plaintiffs' grievances—a failure which the First Circuit found constituted a breach of its duty of fair representation—the Union was relieved of such costs in this case. Where, as here, the Employer has done nothing to promote such an alleged breach and where it has done nothing to frustrate the grievance procedure, considerations of justice, in fact, compel the conclusion that it should not be taxed with attorney's fees.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that this petition for a writ of certiorari be denied.

Respectfully submitted,

JEROME POWELL,
GALL, LANE & POWELL,
Suite 707,
1250 Connecticut Avenue,
Washington, D. C. 20036,

FERNANDO RUIZ-SUBIA,
MCCONNELL, VALDES, KELLY & SUBIA,
G. P. O. Box 4225,
San Juan, Puerto Rico
00936,

MATTHEW E. MURRAY,
RICHARD L. MYERS,
R. THEODORE CLARK, JR.,
JOEL H. KAPLAN,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
111 West Jackson Blvd.,
Chicago, Illinois 60604,

Attorneys for Respondent Puerto Rico Telephone Company

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI IN NO. 385.*

In the Petition in No. 385, numerous authorities are cited reflecting the serious conflict between the Circuits regarding what conduct constitutes a breach of a Union's duty of fair representation. This Court's attention is directed to a recent Third Circuit decision, rendered since the Petition in No. 385 was filed, which further evidences this serious conflict. In *Bazarte v. United Transportation Union*, No. 18,464 (3rd Cir. 1970), 163 Daily Lab. Rep. A-3 (Aug. 21, 1970), handed down August 17, 1970, the Third Circuit was confronted with a claim that a union had breached its duty of fair representation by failing to press a grievance. In overturning the jury verdict and finding the union did not breach its duty, the Third Circuit ruled, 163 Daily Lab. Rep., at A-4, A-5:

> ". . . The union has an obligation in exercising its power as bargaining agent to act fairly under the collective bargaining agreement and not to assert or press grievances which it believes in good faith do not warrant such action. An employee, therefore,

* Petitioner, Puerto Rico Telephone Company, recognizes that this supplement to its original petition, No. 385, for a writ of certiorari is somewhat unusual. We have been informed by a member of the Clerk's office of this Court that recent cases may be brought to this Court's attention in Petitioner's reply brief. Since Respondent Plaintiffs have not filed a timely brief in opposition to No. 385 and it is unknown if Respondent-Union will file such a brief in opposition since its deadline has been extended by Mr. Justice Brennan until September 14, Petitioner is uncertain whether it will have an opportunity to file such a reply brief. In such circumstances, in order to bring this recent, important case to the Court's attention, Petitioner in No. 385 respectfully requests that this supplement be appended to its petition for a writ of certiorari.

> is subject to the union's discretionary power to settle or even to abandon a grievance, so long as it does not act arbitrarily, and this is true even if it can later be demonstrated that the employee's claim was meritorious. It is therefore essential to plaintiff's claim that there should have been proof of 'arbitrary or bad-faith conduct on the part of the Union in processing his grievance.' It follows from this that proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation.
>
> * * * * * *
>
> ". . . Whether [the union representative] or his superior was unwise in his judgment or negligent in arriving at his conclusion, and therefore represented him inadequately, is not the issue in the case. The test is whether the union breached its duty of fair representation by dealing with his claim in bad faith or in an arbitrary manner.".

Contrary to this, the First Circuit has effectively ruled that a breach of its duty of fair representation occurs if a union commits an honest mistake. In the factual setting of the case before it—admittedly good faith motivation by the Union and vigorous pursuit of redress for Plaintiffs, as well as hundreds of other employees, in numerous forums—the First Circuit's ruling that the Union breached its duty of fair representation by not utilizing the grievance procedure for these Plaintiffs clearly equates negligence and/or poor judgment with breach. This is clearly contrary to the Third Circuit's ruling in *Bazarte, supra.*

The numerous factors that motivated Union President Sanchez in not pressing Plaintiffs' grievances—advice of counsel, complete lack of success with other grievances, a broad remedial order by the NLRB, to name but a few—have been set forth in Petitioner's petition and need not be recounted here in detail. What is important is that

the Union's judgment not to pursue these grievances through the contractual grievance procedure was not the product of whim or caprice.[1] And even if, viewed by the First Circuit years later, the decision not to pursue Plaintiffs grievances through the contractual grievance procedure was the result of poor judgment or negligence, though not bad faith, under this recent Third Circuit decision, as well as numerous other authorities (see Petition No. 385 at pages 13-24), this could not constitute a breach of the Union's duty of fair representation.

It is respectfully submitted that this recent decision lends further support for the granting of the writ of certiorari in No. 385.

Respectfully submitted,

JEROME POWELL,
GALL, LANE & POWELL,
Suite 707,
1250 Connecticut Avenue,
Washington, D. C. 20036,

FERNANDO RUIZ-SURIA,
McCONNELL, VALDES, KELLY & SIFRE,
G. P. O. Box 4225,
San Juan, Puerto Rico
00936,

MATTHEW E. MURRAY,
RICHARD L. MARCUS,
R. THEODORE CLARK, JR.,
JOEL H. KAPLAN,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
111 West Jackson Blvd.,
Chicago, Illinois 60604.

Attorneys for Respondent Puerto Rico Telephone Company.

1. It is curious to note that the only evidence before the First Circuit indicating that Plaintiffs were discharged because of automation rather than subcontracting—which, if true, would conceivably have posed a question as to the availability of relief in the NLRB action pursued by the Union—was a statement by Company representative Orellana to Sanchez. That Sanchez could have taken this statement with more than an ounce of skepticism is buttressed by the fact that the Company's argument before the Board that employees had been laid off because of overstaffing, caused, in part, by automation, rather than subcontracting had been summarily rejected by the Board. 149 NLRB at 962, n. 37.